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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1268

WALTER KOCHER,
Petitioner,

v.

HENRY FOWLER, Secretary of the Treasury
and
LESTER D. JOHNSON, Commissioner of Customs,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

HENRY FOWLER, Secretary of the Treasury
and
LESTER D. JOHNSON, Commissioner of Customs,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Walter Kocher prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on December 29, 1967.

CITATIONS TO OPINIONS BELOW

The oral opinion of the District Court is unreported and is printed in Appendix C hereto, *infra*, p. C-4. The opinion of the Court of Appeals is unreported and is printed in Appendix B hereto, *infra*, p. B-2. The opinion of the Court of Appeals in *Eastern States Petroleum Corp. v. Rogers*, upon which the Court of Appeals principally relies in its opinion in the above-entitled case is reported at 108

U.S. App. D.C. 63, 280 F.2d 611, and is printed in Appendix B hereto, *infra*, p. B-8.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1967. (App. B, p. B-1) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether the United States District Court has jurisdiction, under 28 U.S.C. § 1331 and 28 U.S.C. § 1340, of an action for injunctive and declaratory relief brought by an American importer of watches and watch movements who pays approximately 60% ad valorem customs duty thereon to challenge, as a denial of equal protection of the law and deprivation of due process of law, the interpretation given by the Secretary of the Treasury to General Headnote 3a, 19 U.S.C. § 1202 which permits other importers of watches and watch movements to escape payment of customs duty; or whether jurisdiction of such action is exclusively vested in the Customs Court under 28 U.S.C. § 1582 and § 1583?

2. Whether an American importer who pays approximately 60% ad valorem customs duty on watches and watch movements has standing to sue to challenge the constitutionality and legality of the interpretation given by the Secretary of the Treasury to General Headnote 3a, 19 U.S.C. § 1202, which as interpreted and applied gives to other importers of watches and watch movements the privilege if introducing them duty-free into the United States from the Virgin Islands (which is outside the customs territory of the United States), where the operation performed upon said movements in essence is the simple assembly or re-assembly of two sub-assemblies, which duty-free status allows an unfair and discriminatory pricing of watches to the substantial injury of the duty-paying importer?

3. Whether an importer who pays approximately 60% ad valorem customs duty on watches and watch movements is deprived of equal protection of the law and due process of law by General Headnote 3a, 19 U.S.C. § 1202, which as construed and applied by the Secretary of the Treasury permits to other importers duty-free entry into the United States for, and consequent unfair and discriminatory sale pricing of, watches and watch movements of foreign origin via the Virgin Islands, where the operation performed upon said movements in essence is the simple assembly or re-assembly of two sub-assemblies, and where such duty-free status is not available to the duty-paying importer?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Provisions of the United States Constitution involved are:

Article I, § 8, Clause i,

> "The Congress shall have power to lay and collect taxes, duties, imports and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imports, and excises shall be uniform throughout the United States."

Article I, § 8, Clause 3,

> [The Congress shall have power] "to regulate commerce with foreign nations . . . ."

Amendment V,

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . "

Statutes involved are:

United States Tariff Act, 19 U.S.C. § 1202, General Headnote 3a

28 U.S.C. § 1340
28 U.S.C. § 1582
28 U.S.C. § 1583

They are printed in Appendix A, *infra*, pp. A-1-A-3.

The regulation involved is Treasury Decision 54,821(2), 94 Treasury Decisions 14, page 9 (April 2, 1959). It is printed in Appendix A, *infra*, p. A-4.

STATEMENT OF THE CASE

Petitioner Walter Kocher, a citizen of the United States, is an importer of Swiss watches and watch movements, upon which he pays a customs duty of approximately 60% ad valorem. General Headnote 3a, 19 U.S.C. § 1202 provides for the duty-free import into the United States of articles "manufactured" in the Virgin Islands and other U.S. insular possessions, namely Guam. The Treasury Department in Treasury Decision 54,821(2) provided that watch movements brought into the Virgin Islands not in an entirety and therein assembled were articles "manufactured" there, and were indigenous to the Virgin Islands and entitled to duty-free entry into the United States. Watches fitted with Virgin Islands assembled movements typically are unlabelled as to country of origin, as required by 19 U.S.C. § 1304. Under the Treasury Decision over 3,220,000 such movements, valued at over $19,100,000, were permitted duty-free entry from the Virgin Islands to the United States in 1965 alone and much larger quantities as of this date. They originated in France, the Soviet Union (about 600,000 movements), Japan, West Germany, Switzerland and Hong Kong, all unmarked as to country of origin.

The watches and movements entering the United States duty-free from the Virgin Islands are not in fact the manufacture or product of the Virgin Islands within the ordinary meaning of these terms. Typically, watch movements are manufactured in their entireties in foreign countries of ori-

gin. The movement is assembled and operative and then the spring barrel assembly (the power source) is removed, and the movements are shipped to the Virgin Islands in separate shipments to qualify under T.D. 54,821(2) as "parts imported separately into that possession in circumstances not constituting an entirety". The movements are imported into the Virgin Islands by subsidiaries of United States watch companies, and are reassembled by unskilled Virgin Islands labor by more or less simply screwing the two components or sub-assemblies back together.

This Virgin Islands alleged assembly of watch movements adds no value to each watch movement. The subsidiaries typically "sell" the unmanufactured movements to their United States parent companies at an arbitrary mark-up of double the foreign material value, thereby claiming to qualify under General Headnote 3a as not containing "foreign materials to the value of more than 50 per cent of their total value", as required by the headnote for preferential duty-free status. The tactic is one countenanced illegally by the respondents.

Respondents Fowler, Secretary of the Treasury, and Johnson, Commissioner of Customs, permit, and unless enjoined or prevented by the invalidation of T.D. 54,821(2) will continue to permit the described sham transactions to occur and to result in unwarranted duty-free treatment for the foreign watch movements involved.

While not at issue, the Court may be interested that petitioner Kocher is prevented from importing like watch movements from the Virgin Islands in the manner of his competitors because existing quotas for alleged assembly of watch movements in the Virgin Islands are exhausted by grandfather clause licensing.

Petitioner and others similarly situated, who account for 25% of the watches of foreign origin sold in the United States, are engaged in a lawful business. In order to engage in and continue in this lawful business petitioner complies with the laws and regulations in respect to labelling

of foreign country of origin, and pays the prescribed duty on the watches and watch movements he imports.

On May 24, 1966, Petitioner filed a complaint in the United States District Court for the District of Columbia, amended June 28, 1966, seeking injunctive and declaratory relief against the enforcement of T.D. 54,821(2) and the declaration of unconstitutionality of 19 U.S.C. § 1202, General Headnote 3a, as interpreted and applied, by respondents. Petitioner alleged the discriminatory and unfair effect upon him of General Headnote 3a as construed by T.D. 54,821(2) and applied to his damage by respondents. Petitioner further alleged that the ambiguity of General Headnote 3a resulted in an unlawful delegation of legislative authority to the Treasury Department, exercise of which had resulted in an unequal administration of the laws to his damage by permitting duty-free entry of foreign watches and movements by his competitors.

In addition to the foregoing allegations respecting violation of rights arising under the Constitution, petitioner specifically invoked jurisdiction under 28 U.S.C. § 1340, as to his civil action arising from 19 U.S.C. § 1202 as to revenue from imports.

The District Court on June 28, 1966, denied petitioner's motion for preliminary injunction and summary judgment, and on November 9, 1966, granted respondent's motion to dismiss, both on the ground that petitioner lacked standing to bring the action. Notice of Appeal to the U.S. Court of Appeals was timely filed on January 5, 1967.

The United States Court of Appeals for the District of Columbia Circuit on December 29, 1967, affirmed the dismissal, but upon the ground that the District Court had no jurisdiction of the action, and that jurisdiction lies exclusively in the Customs Court.

Petitioner does not seek to escape the payment of the prescribed duties. Rather he seeks to be accorded equal protection of the laws and due process of law by the invalidation of T.D. 54,821(2) or injunction against its continued

enforcement so that the invidious discrimination worked by it against him will be eliminated by precluding preferential duty-free treatment for the imports of his competitors.

Petitioner is not an American manufacturer nor an American wholesaler and accordingly the administrative remedies available to American manufacturers and wholesalers under 19 U.S.C. § 1516 are not available to him. Petitioner's action does not fall within the exclusive jurisdiction of the Customs Court under 28 U.S.C. § 1582, because it is not an appeal for reappraisement, nor a petition for remission of additional duties. Nor does petitioner's action fall within the exclusive jurisdiction of the Customs Court under 28 U.S.C. § 1582 because it does not require review on protest of the decision of a Collector of Customs as to the rate or amount of duties chargeable to petitioner, does not involve decisions excluding merchandise from entry, nor does it involve liquidation, reliquidation or claim for drawback.

Further, the statutory procedure established for the Customs Court by 28 U.S.C. § 2631-2642 (incl.) makes no provision for a civil action such as the instant case.

Nevertheless, the Court of Appeals, in the opinion below held jurisdiction of the instant case to lie exclusively in the Customs Court, principally upon the authority of *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611, cert. den. 364 U.S. 891 (1960) (App. B, *infra*, p.), in which that plaintiff sought relief from a levy of duties on *his* importations. Such is not the case at bar.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is directly in conflict as regards the issue of District Court jurisdiction with *Kreutz v. Durning* (C.C.A. 2, 1934) 69 F.2d 802. The opinion in *Kreutz v. Durning* is printed in Appendix D, *infra*, p. D-1. *Kreutz* was an appeal from a District Court decision dismissing for want of equity plain-

tiff's suit to enjoin the Collector of Customs of the Port of New York from assessing duties against them under the "Anti-Dumping Act", 19 U.S.C. § 160-173. The Circuit Court of Appeals for the General Circuit, speaking through Judge Learned Hand, affirming the judgment of the District Court, said:

> It makes little difference whether with the judge we say that the importers had an adequate remedy at law and so may not come into equity; or whether we dispose of their claims on the merits, holding that the statute is valid. On the whole, it seems to us best, with a renewed caution against any implication that some judicial review is ever necessary in customs controversies to adopt the second course and to affirm the decree upon the merits. (*Id.*, at 804)

Clearly, affirmance on the merits was possible only where there was jurisdiction of the subject matter. So, too, was affirmance upon the other ground, want to equity, because the court could not do equity absent an adequate remedy at law, without jurisdiction of the subject matter of the action.

Further, the decision of the court below is in direct conflict on the jurisdictional issue with *Cottman Co. v. Dailey*, 20 F.Supp. 142, aff'd C.C.A. 4, 1938, 94 F.2d 85. The opinion in *Cottman Co. v. Dailey* is printed in Appendix D, *infra*, p. D-4. The Circuit Court of the Fourth Circuit, speaking through Judge John Parker, affirmed the dismissal of the action for lack of jurisdiction, but *on the grounds that the importer plaintiff was given an adequate remedy at law* in the Customs Court and the Court of Customs and Patent Appeals. This was because the plaintiff was seeking direct benefit to himself by seeking to enjoin the Collector of Customs from assessing a special dumping duty on the plaintiff. The conflict with the decision below arises because the Fourth Circuit Court was careful to limit its holding in the following language:

> We do not mean to say that cases may not arise where a District Court may properly enjoin acts by the Secretary of the Treasury or his assistants, where they are threatening action beyond the scope of their authority which because of extraordinary and exceptional circumstances may result in irreparable injury to a complainant. (*Id.* at 89)

The instant case presents such an exceptional circumstance, and no adequate remedy at law exists, because 28 U.S.C. § 1582 and § 1583 provide no jurisdiction and no legal remedy for an importer whose challenge to an act of the Secretary as being beyond the scope of his statutory authority is grounded on the preferential treatment accorded others by the Secretary's act, and who seeks no direct pecuniary benefit or relief from the customs laws for himself.

Further, and of great significance why the writ should be granted, a distinct conflict of principle exists between the decision of the court below and two decisions of the Supreme Court. These are *Waite v. Macy*, 246 U.S. 893 (1918) and *Bell v. Hood*, 327 U.S. 678 (1946). The opinions in *Waite v. Macy* and *Bell v. Hood* are printed in Appendix D, *infra*, pp. D-8, 10. In *Waite*, the Court sustained a decree enjoining the board of general appraisers from enforcing a rule promulgated by the Secretary of the Treasury requiring exclusion of certain tea because of the presence of coloring matter otherwise harmless. The board was acting in an administrative rather than a quasi-judicial capacity, comparable to that exercised in the instant case by respondent Johnson and his subordinates. Mr. Justice Holmes concluded that:

> "The Secretary and the Board must keep within the statute . . . which goes to their jurisdiction . . . and we see no reason why the restriction should not be enforced by injunction . . . " (Citations omitted)

The court clearly assumed jurisdiction of the subject matter to exist in ruling on the merits. Petitioners' action seeks similar relief upon the identical theory that he is deprived of substantial rights by the acts of the respondents beyond statutory authority and additionally on constitutional grounds.

Bell v. Hood, supra, holds that:

> "Before deciding there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings the suit is master to decide what law he will rely upon . . .'" (*Id.* at 681)

In the instant case the complaint sets forth facts which invoke the jurisdiction of the District Court under 28 U.S.C. § 1331, as well as specifically invoking its jurisdiction under 28 U.S.C. § 1340. Accordingly, the principle of *Bell* is in conflict with the decision of the court below as to jurisdiction, because 28 U.S.C. § 1582 and § 1583 vest jurisdiction in the Customs Court only in specific subject matter and do not confer exclusive jurisdiction of *all* customs matters. *Croton Watch Co. v. Laughlin,* (C.C.A. 2, 1953) 208 F.2d 93. And, jurisdiction is not defeated by the possibility that the complaint fails to state a cause of action on which petitioner might recover, because "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood, supra,* at 682. The decision of the court below would require petitioner to frame his case, if indeed it could be so framed, so as to fit the statutory jurisdiction of the Customs Court, and thus the decision of the court below is substantially in conflict with the principle of *Bell.*

The conflicts of the decision of the court below with decisions of other circuits and with those of this Court, as above described, are sufficient to cause substantial confusion as to the respective jurisdiction of the District Courts

and the Customs Court, and justify granting the writ prayed.

2. The instant case presents a novel question as regards the scope of jurisdiction of the Customs Court under 28 U.S.C. § 1582 and § 1583 in relation to the jurisdiction of District Courts under 28 U.S.C. § 1340. § 1582 and § 1583 vest jurisdiction in the Customs Court in actions where that Court's action will result in a direct pecuniary benefit to the plaintiff, including reappraisement of plaintiff's goods and review of reappraisement, remission of duties to the plaintiff, protests of decisions of rates and amounts of duties chargeable to plaintiff, and decisions excluding plaintiff's merchandise from entry. Decisions relied upon by the court below in its opinion on the instant case are all characterized by direct pecuniary benefit to the plaintiff, within the scope of § 1582 and § 1583, or deal with American manufacturers. *Eastern States Petroleum Corp. v. Rogers,* 280 F.2d 611, cert. den., 364 U.S. 891 (1960) (App. B, *infra,* p. B-8), was an importer's action to enjoin the Attorney General and others from enforcing an import tax proceeding *against the plaintiff* in the Customs Court. Petitioner's action, on the contrary, does not seek such direct pecuniary benefit as is exclusively cognizable by the Customs Court under § 1582 and § 1583. Rather, petitioner willingly pays the lawful duties on his imports and seeks equality of treatment under the customs law, which is denied him on the strength of General Headnote 3a, as construed and applied by T.D. 54,821(2). Not only is a right claimed under the Constitution, but vindication is sought in the District Court, which under 28 U.S.C. § 1340, has jurisdiction of civil actions involving customs laws *except* as jurisdiction is vested in the Customs Court. The fact that petitioner does not challenge the duty as applied to him, but challenges discriminatory preferential treatment of others presents the novel question whether his only forum is not the District Court under § 1340.

Existing authority strongly supports petitioner's position that the Customs Court does not have jurisdiction over his

action. The Customs Court has held that a wholesaler of exclusively foreign merchandise has no right to bring a protest similar to an American manufacturer's protest. *Diamond Tool Research Company, Inc. v. United States,* 55 Cust. Ct. 37, C.D. 2551; *Eastern Diamond Products Company, Inc. v. United States,* 55 Cust. Ct. 62, C.D. 2552; *Mullins Industrial Diamond Corp. v. United States,* 55 Cust. Ct. 72, C.D. 2553.

Authoritative decision upon this point is of great importance to the proper functioning of the judicial system, lest petitioner and others who seek only fair and nondiscriminatory administration of the customs laws be left without a forum.

Quite interesting is the fact that in oral argument on the appeal below, respondents' counsel was asked by the Court, that assuming respondents' conduct was unlawful as alleged, in what court, district or customs, could petitioner seek and obtain relief. Respondents' counsel replied that it was respondents' position that neither the district nor the customs court could entertain jurisdiction of petitioner's complaint and that *no* relief was available to petitioner.

Petitioner does not claim any right cognizable under 28 U.S.C. §§ 1582 and 1583, hence cannot invoke the jurisdiction of the Customs Court. Petitioner does claim rights under the Constitution and consequently, must invoke the jurisdiction of the District Court under 28 U.S.C. §§ 1331 and 1340.

3. The instant case is of substantial immediate importance beyond the interest of petitioner. Petitioner and other importers similarly situated sell approximately 25% of the watches sold in the United States. The market for their merchandise is being systematically undercut and their business being systematically destroyed by the steadily increasing stream of duty-free imports via the Virgin Islands and other insular possessions. American watch manufacturers are similarly affected, to the extent that the manufacture of jeweled-lever watches has severely declined in the Uni-

ted States. A decision on the merits will thus have a vital impact upon an important industry. Further, the existence of duty-free potential for imports might well provide a foreign nation with an important weapon of economic warfare, particularly the Soviet Union.

Petitioner alone, however, has a substantial personal interest in and is adversely affected by Headnote 3a as interpreted by and applied under T.D. 54,821(2). The legal injury petitioner suffers is two-fold: (1) he is taxed and his competitors similarly situated are not taxed, nor can he place himself in the tax-free status of his competitors and (2) he is placed in the position of having his business destroyed by T.D. 54,821(2), issued and applied without statutory authority. The petitioner's interest is direct and personal to him, "As distinguished from the public's interest in the administration of law." *Perkins v. Lukens Steel Co.*, 310 U.S. 113 at 125 (1940). Petitioner does not attack the validity of the tax, its application to him, or the purpose for which revenue raised thereby is spent.

That petitioner is taxed and his competitors are tax-free deprives him of equal protection of the laws, a part of that due process of law guaranteed by the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In the instant case, as in *Morey v. Doud*, 354 U.S. 457 (1957) constitutional protection is invoked not to protect petitioner from the general hazards of business, but against hazards which have their roots in statutory and administrative discrimination. (*Id.* at 468-69) Nor is there a rational basis for the classification of some importers as taxable and some as tax-free, since the tax-free status is unavailable to some. Cf. *Allied Stores v. Bowers*, 358 U.S. 522 (1959).

That Petitioner's direct and personal interest is violated by having his business destroyed by T.D. 54,821(2), issued and applied without statutory authority and in excess of the authority of the Secretary. Due process of law is denied to petitioner and judicial relief is available to him as one who has been injured by an act of a government offi-

cial in excess of his powers. *Harmon v. Brucker*, 355 U.S. 579 (1958). Further, Headnote 3a has not adequately defined "Manufacture", "foreign national", or "value", and hence has not fixed an adequate legislative standard for its interpretation and application by respondents. Hence, Headnote 3a confers no power on the Secretary to issue T.D. 54,821(2) or upon respondents to continue to apply it to the detriment of the petitioner. *United States v. Chicago, M. St. P. and P.R. Co.*, 282 U.S. 311 (1931).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March , 1968

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 1340. Internal revenue; customs duties:

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court. June 25, 1948, c. 646, 62 Stat. 932.

28 U.S.C. § 1582. Review of reappraisement; remission of duties:

The Customs Court shall have exclusive jurisdiction of appeals for reappraisement and applications for review of reappraisement of imported merchandise and petitions for remission of additional duties filed under the custom laws. June 25, 1948, c. 646, 62 Stat. 943.

28 U.S.C. § 1583. Review of decisions on protests:

The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury; decisions excluding any merchandise from entry or delivery, under any provision of the customs laws; and the liquidation or reliquidation of any entry, or the refusal to pay any claim for drawback or to reliquidate an entry for a clerical error as provided by the customs laws. June 25, 1948, c. 646, 62 Stat. 943.

19 U.S.C. § 1202. SUBTITLE I.–TARIFF SCHEDULES OF THE UNITED STATES

Revised Tariff Schedules

General Headnotes and Rules of Interpretation:

1. *Tariff Treatment of Imported Articles.* All articles imported into the customs territory of the United States from outside thereof are subject to duty or exempt therefrom as prescribed in general headnote 3.

2. *Customs Territory of the United States.* The term "customs territory of the United States", as used in the schedules, includes only the States, the District of Columbia, and Puerto Rico.

3. *Rates of Duty.* The rates of duty in the "Rates of Duty" columns numbered 1 and 2 of the schedules apply to articles imported into the customs territory of the United States as hereinafter provided in this headnote:

(a) *Products of Insular Possessions.*

(i) Articles imported from insular possessions of the United States which are outside the customs territory of the United States are subject to the rates of duty set forth in column numbered 1 of the schedules, except that all articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession or of the customs territory of the United States, or of both, which do not contain foreign materials to the value of more than 50 percent of their total value, coming to the customs territory of the United States directly from any such possession, and all articles previously imported into the customs territory of the United States with payment of all applicable duties and taxes imposed upon or by reason of importation which were shipped from the United States, without remission, refund, or drawback of such duties or taxes, di-

rectly to the possession from which they are being returned by direct shipment, are exempt from duty.

(ii) In determining whether an article produced or manufactured in any such insular possession contains foreign materials to the value of more than 50 percent, no material shall be considered foreign which, at the time such article is entered, may be imported into the customs territory from a foreign country, other than Cuba or the Philippine Republic, and entered free of duty.

* * *

(d) *Products of Communist Countries.*

Notwithstanding any of the foregoing provisions of this headnote, the rates of duty shown in column numbered 2 shall apply to products, whether imported directly or indirectly, of the following countries and areas pursuant to section 401 of the Tariff Classification Act of 1962, to section 231 or 257(e)(2) of the Trade Expansion Act of 1962, or to action taken by the President thereunder:

Albania
Bulgaria
China (any part of which may be under Communist domination or control)
Cuba[2]
Czechoslovakia
Estonia
Germany (the Soviet zone and the Soviet sector of Berlin)
Hungary
Indochina (any part of Cambodia, Laos, or Vietnam which may be under Communist domination or control)
Korea (any part which may be under Communist domination or control)
Kurile Islands
Latvia
Lithuania
Outer Mongolia

Rumania
Southern Sakhalin
Tanna Tuva
Tibet
Union of Soviet Socialist Republics and the area in East Prussia under the provisional administration of the Union of Soviet Socialist Republics.

[Footnote omitted]

CUSTOMS

(T.D. 54821)

Abstracts of unpublished decisions

Summary of unpublished customs decisions

Treasury Department,
Office of the Commissioner of Customs,
Washington, D.C., March 27, 1959.

To Collectors of Customs and Others Concerned:

The following abstracts of Bureau of Customs decisions of general interest are published for your information and guidance.

(133.121)

Lawton M. King
Acting Commissioner of Customs.

* * *

INSULAR POSSESSIONS

T.D. 54821(2) *Watch movements.*—The assembly in the Virgin Islands into completed watch movements of various parts imported separately into that possession in circumstances not constituting an entirety results in articles manufactured or produced in that possession entitled to free entry provided the value requirements of section 301, Tariff Act of 1930, as amended, are met and there is compliance with the pertinent regulations. Bureau letter dated March 18, 1959. (017.6)

* * *

APPENDIX B

[United States District Court for the District of Columbia, Civil Action 1367-66]

[Filed November 9, 1966]

ORDER

This cause having come before the Court on defendants' motion to dismiss and plaintiff's opposition thereto and on plaintiff's motion for summary judgment and defendants' opposition thereto, and the Court having considered the motions, exhibits and memoranda of points and authorities and having heard and considered arguments of counsel in open Court and it appearing to the Court that plaintiff lacks standing to bring this action, it is by the Court this 9th day of November, 1966,

ORDERED that defendants' motion to dismiss be and it hereby is granted and that the action be and it hereby is dismissed, and it is further

ORDERED that plaintiff's motion for summary judgment be and it hereby is denied.

United States District Judge

[Certificate of Service]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,765

WALTER KOCHER,
Appellant

v.

HENRY FOWLER,
SECRETARY OF THE TREASURY, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia

Decided December 29, 1967

Mr. Harold J. Nussbaum for appellant.

Mr. Howard J. Kashner, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. David G. Bress*, United States Attorney, and *Alan S. Rosenthal*, Attorney, Department of Justice, were on the brief, for appellees. *Messrs. Richard S. Salzman* and *J. F. Bishop*, Attorneys, Department of Justice, also entered appearances for appellees.

Before FAHY, *Senior Circuit Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

PER CURIAM: From the duties imposed on "[a]ll articles imported into the customs territory of the United States from outside thereof,"[1] including "[a]rticles imported from insular possessions of the United States which are outside the customs territory of the United States,"[2] the Customs Simplification Act of 1954[3] exempted

> ". . . all articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession. . . which do not contain foreign materials to the value of more than 50 per centum of their total value, coming into the United States directly from any such possession . . ."[4]

And in 1959, the Bureau of Customs decided that

> "The assembly in the Virgin Islands into completed watch movements of various parts imported separately into that possession in circumstances not constituting an entirety results in articles manufactured or produced in that possession entitled to free entry"

if the statutory value requirements and pertinent regulations are met.[5] A thriving watch assembly industry has since

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[1] 19 U.S.C. § 1202, General Headnote 1. The "'customs territory of the United States' . . . includes only the States, the District of Columbia, and Puerto Rico." 19 U.S.C. § 1202, General Headnote 2.

[2] 19 U.S.C. § 1202, General Headnote 3(a)(i).

[3] 68 Stat. 1136 (1954).

[4] 68 Stat. 1139 (1954), 19 U.S.C. § 1202, General Headnote 3(a)(i). We note, however, the fact, not involved in this appeal, that Congress, by an amendment of § 1202 effective January 1, 1967, has placed a quota on watches and watch movements with foreign-made components which may enter the United States free of duty. Pub.L. 89-805, 89th Cong., 2d Sess., 80 Stat. 1521 (1966). See S.Rep. No. 1679, 89th Cong., 2d Sess. (1966); H.R.Rep. No. 1076, 89th Cong., 1st Sess. (1965).

[5] T.D. 54,821(2), 94 Treas.Dec. 154 (1959).

developed in the Virgin Islands, nearly all of the output of which has been imported duty-free into the United States.[6]

Appellant, an importer of Swiss watches, challenges the Bureau's decision and the statute it purported to interpret. The decision, he says, effects an impermissible construction of the statute and an unconstitutional discrimination against watches and movements imported from foreign countries. The statute is assailed on the ground that it undertakes an unlawful delegation of legislative power.

Alleging injury in his business relations, appellant sought from the District Court an injunctive annulment of the Bureau's ruling and a declaration that the statute is invalid. The District Court dismissed his suit, being of opinion that appellant had no standing to bring it. We hold that the District Court lacked jurisdiction to entertain the action and accordingly affirm.

Federal district courts "have original jurisdiction of any civil action arising under any Act of Congress providing for . . . revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."[7] The Customs

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[6] "The largest of the industries which have sprung up in the possessions as a result of the 1954 change is the watch assembly industry. This industry was first established in the Virgin Islands late in 1959 and since then has shipped virtually its entire output of watches to the United States free of duty . . . . These watches are assembled from parts and subassemblies obtained principally from Japan, West Germany and France. An increasingly large volume of Soviet parts are also utilized in the assembly process. . . . The method of assembly used in the islands does not vary greatly from plant to plant. A concern usually obtains all parts for a particular type of movement from the same foreign supplier; the parts are received both as unassembled parts and as subassemblies. Generally the major share of the parts are already assembled. The subassemblies and other parts are assembled into a complete movement which is then sold in the United States either to a parent organization or to retailers of private brands or other importers at prices ranging from $4 to $8 per movement. . . ." S.Rep. No. 1679, 89th Cong., 2d Sess. 3, 4 (1966). See also H.R.Rep. No. 1076, 89th Cong., 1st Sess. 2 (1965).

[7] 28 U.S.C. § 1340.

Court has "exclusive jurisdiction to review on protest the decisions of any collector of customs . . . as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury; . . ."[8] These provisions invest only the Customs Court with the jurisdiction to consider appellant's contentions.

In *Eastern States Petroleum Corp.* v. *Rogers*,[9] we held that only in the Customs Court may an importer seek relief from a levy of duties on his importations.[10] That court's jurisdiction is not ousted by appellant's effort to draw the statute into controversy,[11] or by his presentation of constitutional issues for resolution.[12] We understand, however, that appellant prefers an order requiring the imposition of duties on watches and movements his competitors import from the Virgin Islands[13] rather than a ban against the assessment of duties on the watches he imports from Switz-

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[8] 28 U.S.C. § 1583.

[9] 108 U.S.App.D.C. 63, 280 F.2d 611, *cert. denied* 364 U.S. 891 (1960).

[10] See 19 U.S.C. §§ 1514, 1515. See also *Patchoque-Plymouth Mills Corp.* v. *Durning*, 101 F.2d 41, 43-44 (2d Cir. 1939); *Cottman Co.* v. *Dailey*, 94 F.2d 85, 88 (4th Cir. 1938).

[11] *Horton* v. *Humphrey*, 146 F.Supp. 819 (D.D.C.) *aff'd* 352 U.S. 921 (1956).

[12] *Eastern States Petroleum Corp.* v. *Rogers*, *supra* note 9, 108 U.S. App.D.C. at 65, 280 F.2d at 613; *North American Cement Corp.* v. *Anderson*, 109 U.S.App.D.C. 162, 163, 284 F.2d 591, 592 (1960); *Morgantown Glassware Guild* v. *Humphrey*, 98 U.S.App.D.C. 375, 376-77, 236 F.2d 670, 671-72, *cert. denied* 352 U.S. 896 (1956).

[13] Although appellant did not specifically ask for this relief in the original or the amended complaint, we gather from the record that this request somehow crept into the proceedings under review. And by brief in this court, appellant tells us that he "does not ask a reduction in the tax he pays but he asserts the invalidity of the Treasury Decision in order to require the imposition of like taxes on competitor importers. . . ."

erland. But as we concluded in *Boston Wool Trade Ass'n* v. *Snyder*,[14] an importer's action to compel the Secretary of the Treasury to instruct customs officials to collect duties on imported commodities falls exclusively within the purview of the Customs Court.[15] We think it clear that appellant must make his plea there.

Affirmed.

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[14] 82 U.S.App.D.C. 144, 161 F.2d 648 (1947).

[15] See also *North American Cement Corp.* v. *Anderson*, *supra* note 12.

[United States Court of Appeals for the District of Columbia Circuit, No. 20,765 (Civil 1367-66)]

[Filed December 29, 1967]

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam

Dated: December 29, 1967

OPINION OF COURT

(108 U.S.App. D.C. 63, 280 F.2d 611)

Eastern States Petroleum Corporation, Appellant

v.

William P. Rogers, Attorney General of the United States, et al., Appellees

No. 15109

United States Court of Appeals
District of Columbia Circuit

Argued March 18, 1960

Decided May 12, 1960

Petition for Rehearing en Banc Denied
June 7, 1960

Mr. Gerard R. Moran, Newark, N. J., of the bar of the Supreme Court of Virginia, pro hac vice, by special leave of court, with whom Mr. Edwin G. Martin, Washington, D. C., was on the brief, for appellant.

Mr. Seymour Farber, Atty., Dept. of Justice, with whom Asst. Atty. Gen. George C. Doub, Messrs. Oliver Gasch, U. S. Atty., and Alan S. Rosenthal, Atty., Dept. of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, BAZELON and FAHY, Circuit Judges.

BAZELON, Circuit Judge.

This appeal from the District Court relates to appellant's attack, begun in the United States Customs Court some eight years ago, upon the tax rate imposed upon petroleum imports between January 1, 1951 and October 11, 1952. The Customs Court proceedings were stayed pending the outcome of two other cases raising substantially identical questions. The importers in these cases contended that the President's proclamation increasing the duty from one-fourth to one-half cent per gallon was contrary to statute and an unconstitutional exercise of power.[1] The Court of Customs and Patent Appeals ultimately rejected these

1. Specifically, the importers' position is that a provision in the Reciprocal Trade Agreements Act then in force, 19 U.S.C.A. § 1351, prohibited the President from increasing the duty by more than fifty percent. The importers further contend that if, as the Court of Customs and Patent Appeals held, such limitation does not apply to the type of increase here involved, there are no constitutionally adequate statutory standards to guide the President in the exercise of his rate-revising authority.

claims and the Supreme Court denied certiorari.[2]

Appellant, whose case is still pending in the Customs Court, then brought the instant suit to enjoin the Attorney General, the Secretary of the Treasury, and their subordinates from enforcing the tax through proceedings in the customs courts.[3] The complaint asserted that, as a result of the unfavorable decisions in the two companion cases, appellant's opportunity to secure recognition of its constitutional rights in the customs courts has become "so onerous, hazardous and speculative that it constitutes an inadequate remedy * * * which plaintiff may by-pass" to secure redress in a tribunal with statutory authority to enjoin administrative officials. It also asserted that Article III and the due process clause of the Constitution entitle it to have its constitutional claims adjudicated in a court created under Article III. Appellant requested that a three-judge court be convened, pursuant to the provisions of 28 U.S.C. § 2282 (1958).

The Government moved to dismiss the complaint for lack of jurisdiction. District Judge McGarraghy, sitting alone, granted the Government's motion. Appellant thereupon applied to the Chief Judge of this Circuit for an order designating two additional judges to complete a three-judge district court. Chief Judge Prettyman denied the motion.[4]

2. United States v. Metropolitan Petroleum Corp., 42 CCPA 38, certiorari denied, 1954, 348 U.S. 858, 75 S.Ct. 82, 99 L.Ed. 676; United States v. American Bitumuls & Asphalt Co., 246 F.2d 270, 44 CCPA 199, certiorari denied, 1957, 355 U.S. 883, 78 S.Ct. 150, 2 L.Ed.2d 113.

3. This refers to both the Customs Court, and the Court of Customs and Patent Appeals.

Appellant then sought review from Judge McGarraghy's ruling by direct appeal to the Supreme Court, and moved for leave to file a petition for a writ of mandamus against Chief Judge Prettyman and District Judge McGarraghy. The Supreme Court dismissed the appeal[5] and denied the motion.[6] Appellant thereupon prosecuted the present appeal from the dismissal below.[7]

[1–3] We think the District Court correctly decided that it lacked jurisdiction. Under the distribution of judicial power which Congress has established the Customs Court has "*exclusive* jurisdiction to review on protest the decisions of any collector of customs * * *." 28 U.S.C. § 1583 (1958) (emphasis supplied). Conversely, 28 U.S.C. § 1340 provides that "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for * * * revenue from imports or tonnage *except matters within the jurisdiction of the Customs Court*." 28 U.S.C. § 1340 (1958) (emphasis supplied). This jurisdictional scheme is limited to non-constitutional matters, and it is clear that the customs courts cannot do, as in the two companion cases, rule upon constitutional questions. Horton v. Humphrey, D.C.D.C., 146 F.Supp.

4. 1959, 105 U.S.App.D.C. 219, 265 F.2d 593.

5. Eastern States Petroleum Corp. v. Rogers, 1959, 361 U.S. 7, 80 S.Ct. 50, 4 L.Ed.2d 49.

6. Eastern States Petroleum Corp. v. Prettyman, 1959, 361 U.S. 805, 80 S.Ct. 34, 4 L.Ed.2d 56.

7. Our jurisdiction to review the action of the District Court is not questioned. See Wicks v. Southern Pacific Co., 9 Cir., 231 F.2d 130, certiorari denied Wicks v. Brotherhood of Maintenance of Way

OPINION OF COURT

(108 U.S. App. D.C. 63, 280 F.2d 611)

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Mr. Seymour Farber, Atty., Dept. of Justice, with whom Asst. Atty. Gen. George C. Doub, Messrs. Oliver Gasch, U. S. Atty., and Alan S. Rosenthal, Atty., Dept. of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, BAZELON and FAHY, Circuit Judges.

BAZELON, Circuit Judge.

This appeal from the District Court relates to appellant's attack, begun in the United States Customs Court some eight years ago, upon the tax rate imposed upon petroleum imports between January 1, 1951 and October 11, 1952. The Customs Court proceedings were stayed pending the outcome of two other cases raising substantially identical questions. The importers in these cases contended that the President's proclamation increasing the duty from one-fourth to one-half cent per gallon was contrary to statute and an unconstitutional exercise of power.[1] The Court of Customs and Patent Appeals ultimately rejected these

1. Specifically, the importers' position is that a provision in the Reciprocal Trade Agreements Act then in force, 19 U.S.C.A. § 1351, prohibited the President from increasing the duty by more than fifty percent. The importers further contend that if, as the Court of Customs and Patent Appeals held, such limitation does not apply to the type of increase here involved, there are no constitutionally adequate statutory standards to guide the President in the exercise of his rate-revising authority.

claims and the Supreme Court denied certiorari.[2]

Appellant, whose case is still pending in the Customs Court, then brought the instant suit to enjoin the Attorney General, the Secretary of the Treasury, and their subordinates from enforcing the tax through proceedings in the customs courts.[3] The complaint asserted that, as a result of the unfavorable decisions in the two companion cases, appellant's opportunity to secure recognition of its constitutional rights in the customs courts has become "so onerous, hazardous and speculative that it constitutes an inadequate remedy * * * which plaintiff may by-pass" to secure redress in a tribunal with statutory authority to enjoin administrative officials. It also asserted that Article III and the due process clause of the Constitution entitle it to have its constitutional claims adjudicated in a court created under Article III. Appellant requested that a three-judge court be convened, pursuant to the provisions of 28 U.S.C. § 2282 (1958).

The Government moved to dismiss the complaint for lack of jurisdiction. District Judge McGarraghy, sitting alone, granted the Government's motion. Appellant thereupon applied to the Chief Judge of this Circuit for an order designating two additional judges to complete a three-judge district court. Chief Judge Prettyman denied the motion.[4] Appellant then sought review from Judge McGarraghy's ruling by direct appeal to the Supreme Court, and moved for leave to file a petition for a writ of mandamus against Chief Judge Prettyman and District Judge McGarraghy. The Supreme Court dismissed the appeal[5] and denied the motion.[6] Appellant thereupon prosecuted the present appeal from the dismissal below.[7]

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2. United States v. Metropolitan Petroleum Corp., 42 CCPA 38, certiorari denied, 1954, 348 U.S. 858, 75 S.Ct. 82, 99 L.Ed. 676; United States v. American Bitumuls & Asphalt Co., 246 F.2d 270, 44 CCPA 199, certiorari denied, 1957, 355 U.S. 883, 78 S.Ct. 150, 2 L.Ed.2d 113.

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4. 1959, 105 U.S.App.D.C. 219, 265 F.2d 593.

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7. Our jurisdiction to review the action of the District Court is not questioned. See Wicks v. Southern Pacific Co., 9 Cir., 231 F.2d 130, certiorari denied Wicks v. Brotherhood of Maintenance of Way of

821 (3-judge court), affirmed per curiam, 1956, 352 U.S. 921, 77 S.Ct. 224, 1 L.Ed. 2d 157; Morgantown Glassware Guild, Inc. v. Humphrey, 98 U.S.App.D.C. 375, 236 F.2d 670, certiorari denied, 1956, 352 U.S. 896, 77 S.Ct. 133, 1 L.Ed.2d 87. Decisions of the Court of Customs and Patent Appeals are reviewable in the Supreme Court on writ of certiorari, 28 U.S.C. § 1256 (1958).

[4–6] Appellant contends, however, that the District Court has jurisdiction notwithstanding the exception in § 1340, since this is not a case "arising under any Act of Congress providing for * * * revenue from imports * * *." Rather, they contend it is a case "aris[ing] under the Constitution, laws, or treaties of the United States," and thus within the ambit of 28 U.S.C. § 1331 (1958). Section 1331 vests federal question jurisdiction in the district courts and, unlike § 1340, contains no exception relating to Customs Court jurisdiction. But we do not agree that Congress' failure to provide an exception to § 1331 similar to that specified in § 1340 indicates an intent to open a loophole in its clear purpose to exclude customs cases from the district courts. When Congress provides a specific judicial remedy, relief may generally be accorded only through the specified procedure. Cf. Lichter v. United States, 1948, 334 U.S. 742, 789–793, 68 S.Ct. 1294, 92 L.Ed. 1694; Lockerty v. Phillips, 1943, 319 U.S. 182, 68 S.Ct. 1019, 87 L.Ed. 1339. Moreover, the right to equitable relief presupposes the nonexistence of an adequate remedy at law. The customs courts provide an adequate remedy except in cases of extreme hardship, Horton v. Humphrey, supra. The fact that the customs courts are likely to reject appellant's constitutional claims does not make this a case of unusual hardship. Cottman Co. v. Dailey, 4 Cir., 1938, 94 F.2d 85, 89.

Appellant attacks the foregoing construction of these jurisdictional statutes on the ground that, at some stage of the litigation, it is constitutionally entitled to have its constitutional claims heard and determined in an Article III court, and that such a hearing must be available as of right and not as a matter of discretion.

There is at the outset considerable doubt as to whether the customs courts are legislative rather than Article III courts. Some years ago, the Supreme Court held that the Court of Customs Appeals (now the Court of Customs and Patent Appeals) was a legislative court, Ex parte Bakelite Corp., 1929, 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789; that is to say, it was a court created under the congressional power "to lay and collect Taxes, Duties, Imposts and Excises," U.S.Const. art. I, § 8, and not under the power to "ordain and establish" courts inferior to the Supreme Court, U.S. Const. art. III, § 1. But Congress has recently revised the statutes creating the customs courts and stated that they are "hereby declared to be * * * court[s] established under article III of the Constitution of the United States." 28 U.S.C. §§ 211, 251 (1958). Appellant contends, however, that such declaration is ineffective to create an Article III court because the Supreme Court said in Bakelite that "whether a court is of

Emp. Southern Pac. Co., 1956, 351 U.S. 946, 76 S.Ct. 845, 100 L.Ed. 1471.

Appellant protected its right of appeal to this court by securing from the District Court extensions of the time in which to docket the record on appeal.

one class or the other [does not] depend on the intention of Congress * * * the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U.S. at page 459, 49 S.Ct. at page 416. But see 1 Moore, Federal Practice § 0.4[4] (1959).

We do not decide, however, whether the expression of congressional intent is sufficient to transform the customs courts into Article III tribunals. For even if the customs courts are still legislative courts we think appellant's argument must fail. It was previously, and we think correctly rejected in Riccomini v. United States, 9 Cir., 1934, 69 F.2d 480, 483–484.

[7, 8] We recognize, as appellant argues, that "a construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored." Lockerty v. Phillips, 1943, 319 U.S. 182, 188, 63 S.Ct. 1019, 1023, 87 L.Ed. 1339; see Lynch v. United States, 1934, 292 U.S. 571, 586–587, 54 S.Ct. 840, 78 L.Ed. 1434. And we assume, for present purposes, that the congressional power to confer and withdraw federal jurisdiction is itself subject to constitutional limitations, including those of due process. Crowell v. Benson, 1932, 285 U.S. 22, 56, 52 S.Ct. 285, 76 L.Ed. 598; Battaglia v. General Motors Corp., 2 Cir., 169 F.2d 254, 257, certiorari denied 1948, 335 U.S. 887, 69 S.Ct. 236, 93 L.Ed. 425; see Hart & Wechsler, Federal Courts and the Federal System 312–40 (1953). But this is not a case where there is an asserted constitutional right without a constitutionally adequate remedy. Certiorari may be sought in what is obviously an Article III court. And even in cases where an adverse decision of the customs courts involving constitutional questions stands unreviewed, we do not think the taxpayer is denied due process. In our view, the distinctions between the customs courts and the district courts do not rise to a level at which it may be said that final adjudication of constitutional questions in the customs courts offends the requirements of due process. Judges of the customs courts, like judges of Article III courts, are appointed by the President, with the advice and consent of the Senate, and serve during good behavior.[8] Customs courts entertain "cases and controversies" within the meaning of Article III, as shown by the fact that these cases are reviewable by the Supreme Court under its appellate jurisdiction.[9] We therefore reject appellant's constitutional objections to its exclusion from the District Court.

8. See 28 U.S.C. § 213 (Court of Customs and Patent Appeals), § 252 (Court of Customs), § 44 (circuit courts), § 134 (district courts) (1958).

Judges of the Customs Court receive the same salary as district judges, compare 28 U.S.C. § 252 (1958) with 28 U.S.C. § 135 (1958); judges of the Court of Customs and Patent Appeals receive the same salary as circuit judges, compare 28 U.S.C. § 213 (1958) with 28 U.S.C. § 44(d) (1958).

9. United States v. Stone & Downer Co., 1927, 274 U.S. 225, 232–233, 47 S.Ct. 616, 71 L.Ed. 1013; see, e. g., Norwegian Nitrogen Products Co. v. United States, 1933, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796; cf. Pope v. United States, 1944, 323 U.S. 1, 13–14, 65 S.Ct. 16, 89 L.Ed. 3. See generally, Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, §§ 248–249 (2d ed. Wolfson & Kurland 1951).

[9] The only remaining question is whether the District Court was authorized to dismiss the complaint without requesting the convening of a three-judge court.[10] Prior to 1942, the law was well settled that "the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction" and "does not require three judges to pass upon this initial question of jurisdiction." Ex parte Poresky, 1933, 290 U.S. 30, 31–32, 54 S.Ct. 3, 4, 78 L.Ed. 152.

Appellant asserts, however, that the 1942 amendment providing that "A single judge shall not * * * dismiss the action" has overturned the prior rule.[11] Although there are some shreds of legislative history to support this view,[12] consistent judicial construction has rejected it. In White v. Gates, 102 U.S.App.D.C. 346, 253 F.2d 868, 869, certiorari denied, 1958, 356 U.S. 973, 78 S.Ct. 1136, 2 L.Ed.2d 1147, this court said, "without convening a three-judge court * * * a single judge may dismiss a complaint that * * * fails to raise a substantial constitutional question." The Ninth Circuit reached the same conclusion in Wicks v. Southern Pacific R. R., 9 Cir., 231 F.2d 130, certiorari denied, Wicks v. Brotherhood of Maintenance of Way Emp. Southern Pac. Co., 1956, 351 U.S. 946, 76 S.Ct. 845, 100 L.Ed. 1471. And in Jacobs v. Tawes, 4 Cir., 1957, 250 F.2d 611 the Fourth Circuit held that a single judge may dismiss an application for a three-judge court if the district court, no matter how consti-

10. 28 U.S.C. § 2282 (1958) provides that an "injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted * * * [except] by a district court of three judges under section 2284 of this title."

11. 28 U.S.C. § 2284 now reads in pertinent part:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

* * * * *

"(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. *A single judge shall not* appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or *dismiss the action*, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing." [Emphasis supplied.]

12. Appellant places particular reliance upon a report of the Bar Association of the City of New York stating that it believed the bill would overrule Ex parte Poresky, 1933, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152, and that this result was desirable. See H.R.Rep. No. 1677, 77th Cong., 2d Sess. 5 (1942). But there is no indication that any member or committee of Congress embraced this suggestion or anticipated such a result.

tuted, lacks jurisdiction. Finally, Chief Judge Prettyman, in an earlier phase of this litigation, reached the same conclusion. 1959, 105 U.S.App.D.C. 219, 265 F.2d 593. As these decisions make clear, the provision of § 2284 precluding single-judge dismissal, along with the other procedural requirements of that section, becomes operative only after a three-judge court is convened. This is implied from the introductory passage of § 2284, reprinted in the margin at note 11.

The action of the District Court is therefore

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Walter Kocher

v.

Civil Action
No. 1367-'66

Henry Fowler,
Secretary of the Treasury

Lester D. Johnson,
Commissioner of Customs

DOCKET ENTRIES

1966	
May 24	Complaint filed.
June 28	Amended complaint; c/m 6/24/66, filed.
June 28	Findings of Fact and Conclusions of Law. (N) Micro 6/29/66, Holtzoff, J., filed.
June 28	Order denying motion of plaintiff for preliminary injunction. (N) Micro 6/29/66, Holtzoff, Jr., filed.
July 22	Motion of deft. to dismiss complaint; c/m 7/22; P&A; M.C. 7/22/66, filed.
July 26	Opposition of pltff to deft's motion to dismiss; c/m 7/26/66, filed.
Aug. 1	Transcript of proceedings, 6/16/66; Vol. I, pp. 3, (Rep: Gerald Nevitt) (Clerk's copy), filed.
Aug. 15	Motion of pltf for summary judgment; c/s 8/15; statement; P&A filed. M.C. 8/15/66.
Aug. 25	Opposition of defts to motion of pltff for summary judgment; c/m 8/25/66, filed.
Aug. 29	Supplemental memorandum of P&A in support of motion of pltf for summary judgment and opposition by pltf to motion of deft to dismiss; exhibit A; c/m 8/26/66, filed.

Nov. 9	Order denying pltf's motion for summary judgment; granting defts' motion to dismiss and dismissing action. (N) Holtzoff, J.
1967	
Jan. 5	Notice of appeal by pltff. from order of 11/9/66; copy mailed to Arnold T. Aikens, filed.

[Filed June 28, 1966]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for hearing upon plaintiff's motion for preliminary mandatory injunctive relief and the Court having considered the pleadings, exhibits and affidavits filed in the cause and having considered the arguments of counsel for the parties made in open Court, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff Walter Kocher is an importer of watches and watch movements from Switzerland on which a tariff duty is levied and collected. He competes with others who import watch movements from the Virgin Islands.

2. Defendants herein are Henry Fowler, Secretary of the Treasury and Lester D. Johnson, Commissioner of Customs.

3. The Tariff Act of 1930, as amended, 19 U.S.C. § 1202, (Headnote 3a), provides that articles manufactured or produced in an insular possession of the United States from materials the growth, product or manufacture of such possession which do not contain foreign materials to the value of more than 50% of their total value, shall be admitted into the United States free of duty.

4. Pursuant to the Tariff Act, 19 U.S.C. § 1202 (Headnote 3a), the Secretary of the Treasury has determined in

Treasury Decision 54,821 that the assembly in the Virgin Islands into completed watch movements of parts imported separately into that possession in circumstances not constituting as entirety results in articles manufactured and produced in that possession entitled to free entry provided the value requirements of the Tariff Act are met.

5. Plaintiff challenges the validity of the Secretary's determination in Treasury Decision 54,821 and seeks an order declaring this determination a nullity and an order directing the Commissioner of Customs to collect duties on watches or watch movements imported from the Virgin Islands.

6. Plaintiff lacks standing to maintain this action.

Conclusions of Law

Based upon the foregoing findings of fact, the Court has filed a memorandum opinion in this cause on the 16th day of June, 1966 and further concludes as a matter of law:

1. *In limine* plaintiff lacks standing to bring this action.

2. Plaintiff has failed to demonstrate the probability of success on the merits.

3. The preliminary injunction should be denied.

United States District Judge

[Filed June 28, 1966]

ORDER

This cause having come on to be heard on the 16th of June, 1966 upon plaintiff's motion for a preliminary injunction, and the Court having considered the pleadings, exhibits and affidavits filed in the matter, and having heard and considered arguments of counsel in open Court, and having filed herein a memorandum opinion and its findings of fact

and conclusions of law, it is by the Court this 28th day of June, 1966,

ADJUDGED, ORDERED AND DECREED that the motion for preliminary injunction be and the same hereby is denied.

s/ Alexander Holtzoff
United States District Judge

ORAL OPINION
June 16, 1966

THE COURT: Plaintiff, who is an importer of foreign watches in this country, complains of a regulation and a practice of the Treasury Department which permits watch movements originally made in Japan and brought to the Virgin Islands and eventually being brought to the Continental United States, being admitted free of duty. The plaintiff *in limine* is barred by the fact that he has no standing to sue. The mere fact that he is being hurt commercially by competition does not give him standing to seek a declaration of invalidity of a governmental regulation or practice. This rule is fundamental, goes back to the leading case of *Massachusetts against Mellon and Frothingham against Mellon*, reasserted and applied in the case of *Alabama Power Company against Ickes*, 302 U.S. 464, *Tennessee Electric Power Company vs. Tennessee Valley Authority*, 306 U.S. 118. But beyond that, what is before the Court at this juncture is a motion for a preliminary injunction, not an injunction that would maintain the status quo, but that would on the contrary accord to the plaintiff affirmatively the relief that he would be entitled to if he prevailed at the trial. Such extraordinary relief may not be granted on a motion for preliminary injunction, especially where there is no showing of any likelihood that the plaintiff would succeed and prevail at the trial of this action.

There is a presumption of regularity of course of administrative action, and the plaintiff has not shown that he is likely to prevail at the trial and establish that the action of the Treasury Department is not warranted under the law.

For all of these reasons, the motion of a preliminary injunction is denied. Government counsel will submit a proposed order and findings of fact.

* * *

[Filed June 28, 1966]

AMENDED COMPLAINT

Walter Kocher, complaining of the defendants, alleges:

1. The plaintiff resides at 548 South Broadway, Tarrytown, New York, in the County of Westchester.

2. That the plaintiff is an importer of watches and/or watch movements manufactured in Switzerland.

3. That jurisdiction exists in this court by virtue of Section 1340, Title 28, United States Code Annotated.

4. That the Congress of the United States enacted Section 301 of the United States Tariff Act, which became Public Law 768 of the Eighty-third Congress, which reads as follows:

> "There shall be levied, collected, and paid upon all articles coming into the United States from any of its insular possessions, except Puerto Rico, the rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries: except that all articles *the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product or manufacture of any such possession or of the United States, or of both,* which do not contain foreign materials to the value of more than fifty (50%) percent of their total value,

coming into the United States directly from any such possession, and all articles previously imported into the United States with payment of all applicable duties and taxes imposed upon or by reason of importation which are shipped from the United States, without remission, refund, or drawback of such duties or taxes directly to the possession from which it is being returned by direct shipment, shall be admitted free of duty upon compliance with such regulations as to proof of origin as may be prescribed by the Secretary of the Treasury, in determining whether an article produced or manufactured in any such insular possession contains foreign materials to the value of more than fifty (50%) per centum, no material shall be considered foreign which, at the time such article is entered or withdrawn from warehouse, in the United States for consumption, may be reported into the United States from a foreign country, other than Cuba or the Philippine Republic, free of duty. (Public Law 768-83rd Congress) Note: Old Sec. 301, Philippine Islands was repealed by Sec. 511 of the Philippine Trade Act of 1946 (60 Stat. 158). (Emphasis supplied)

SEC. 302. PUERTO RICO–EXEMPTION FROM INTERNAL REVENUE TAXES. Repealed by Sec. 4 of the Act of February 10th, 1938 (53 Stat. 1-1st)."

*/ [See footnote below]

That thereafter the United States Treasury Department in Treasury Decision 54,821, published in Volume 94, April 2nd, 1959, Number 14, on Page 9, determined the following:

"Insular Possessions. T.D. 54,821(2) Watch Movements. The assembly in the Virgin Islands into completed watch movements of various parts imported separately into that possession *in circumstances not*

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* The above is now Title 19, Section 1202, General Headnote 3a.

constituting an entirety results in articles manufactured or produced in that possession entitled to free entry provided the value requirements of Section 301, Tariff Act of 1930, as amended, are met and there is compliance with the pertinent regulations. Bureau letter dated March 18, 1959. (017.6)." (Emphasis supplied)

5. Thereafter, upon information and belief, in individual rulings based on the aforementioned Treasury Decision Number 54,821(2), the United States Bureau of Customs has been permitting watches and/or watch movements of foreign origin, not the product or growth of the insular possessions to enter the United States of America free of duty as alleged products of the Virgin Islands and/or Guam. That said watches and/or watch movements have been so entering the United States from the date of the Treasury Decision aforementioned, March 18, 1959, to date.

6. Upon information and belief, that Treasury Decision 54,821(2) aforementioned, is not within the authority of the aforementioned Insular Possessions Act, Section 301, of the United States Tariff Act, as amended from time to time and now appearing in the United States Tariff Act as general headnote number 3a, Section 1202, Title 19, as same permits products to enter the United States of America free of duty, which are not the product or growth of the insular possession. That the Secretary of the Treasury and the Commissioner of Customs are bound by law not to permit dutiable merchandise to enter the United States free of duty. That, upon information and belief, by virtue of the interpretation, of the Secretary of the Treasury and the Commissioner of Customs, of Section 301, as amended and as now appears as headnote 3a of the United States Tariff Act, foreign watches and/or watch movements are entering the United States free of duty.

7. That presently HON. HENRY FOWLER is the Secretary of the Treasury and HON. LESTER D. JOHNSON is the Commissioner of Customs, both being charged with the enforce-

ment of Section 301 as amended, now headnote 3a of the United States Tariff Act.

8. That demands have been made upon the office of the Secretary of the Treasury and upon the Commissioner of Customs to cause the importation of foreign watches and/or watch movements from the Virgin Islands to cease except upon the payment of full duties. That plaintiff is an importer of Swiss watches and/or watch movements, and as such pays the full customs duties charged by the office of the United States Customs in enforcement of the Tariff Act. Upon information and belief, that by reason of the interpretation of Treasury Decision 54,821(2), watches and/or watch movements, largely of Japanese origin, enter the United States through the Virgin Islands and Guam without payment of any duties, free of label as to origin.

9. That such course of conduct is discriminatory, unfair and imposes an illegal burden upon the commerce transacted by plaintiff, in importing watches and/or watch movements of Swiss origin, subject to full duties.

10. That plaintiff is daily being injured in his business by virtue of the actions of the respondents in permitting large quantities of watches and/or watch movements of foreign origin to enter the United States free of duty and free of the requirement of marking as to foreign origin. That same is discriminatory against the importations made by plaintiff, and represent an unequal administration of law.

11. That upon information and belief, the loss to the United States Treasury by means of the importation of watches and/or watch movements of foreign origin without payment of duties, is currently at the rate of eighteen million dollars per annum, more or less.

12. That Congress in legislating section 1202, general headnote 3a of Title 19, failed to accurately define a product of the insular possessions. That as a result thereof, the United States Treasury was constrained to make its own legislation (unauthorized by Congress), in defining said

product of an insular possession. That the United States Treasury had no authority to make such legislation, i.e., Treasury Decision 54,821 aforementioned and rulings connected therewith. Hence, Section 1202 general headnote 3a Title 19 was ambiguous and constituted an unlawful delegation of Congressional authority to the United States Treasury.

13. That no previous application for the relief demanded herein, nor for similar relief, has been made to any court or judge.

WHEREFORE, plaintiff respectfully prays that this court may grant an order directed to said HON. HENRY FOWLER, Secretary of the Treasury, and said HON. LESTER D. JOHNSON, Commissioner of Customs, commanding them to annul the determination made by them, or their predecessors in office, with respect to Treasury Decision 54,821(2), and declaring general headnote 3a, Section 1202, Title 19 vague, indefinite, illegal and unconstitutional, and for such other and further relief as may seem just and proper.

s/ Walter Kocher

[Jurat]

[Filed July 22, 1966]

MOTION TO DISMISS

Come now defendants by their attorney, the United States Attorney for the District of Columbia, and respectfully move the Court to dismiss the complaint herein on the ground plaintiff lacks standing to sue.

In support hereof, defendants submit a Memorandum of Points and Authorities.

s/ David G. Bress

s/ Joseph M. Hannon

s/ Arnold T. Aikens

[Filed July 26, 1966]

OPPOSITION TO MOTION TO DISMISS

Comes now the plaintiff, by and through counsel, Harold J. Nussbaum, and opposes defendants' motion to dismiss, and in support of such will submit points and authorities and such other reasons as may be shown on oral argument hereof.

s/ Harold J. Nussbaum
Attorney for Plaintiff

[Certificate of Service]

[Filed Aug. 15, 1966]

MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, by his attorneys, Harold J. Nussbaum and Milton M. Jacobs, and respectfully moves this Court for Summary Judgment on the ground that there is no genuine issue of any material fact, that the defendants lack any defense to the merits of the plaintiff's action, and that plaintiff is entitled to judgment as a matter of law.

For reasons therefor plaintiff refers the Court to the Points and Authorities, Statement of Material Facts under Local Rule 9(h) and such other reasons as shall appear on the oral argument of this motion.

Harold J. Nussbaum
Milton M. Jacobs
Attorneys for Plaintiff

[Certificate of Service]

[Filed Aug. 25, 1966]

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Come now defendants by their attorney, the United States Attorney, and oppose plaintiff's motion for summary judgment for the reasons and grounds set forth in defendants' memorandum of points and authorities in support of their motion to dismiss, now pending before this Court. The argument in that memorandum of law is incorporated herein in its entirety.

In order to avoid the possibility of this Court assuming, pursuant to the third paragraph of Local Rule 9(h), that defendants agree plaintiff's statement of facts contains material facts, the Court is respectfully informed that defendants object to paragraphs 9, 10, and 17 as immaterial. Plaintiff's statement of fact, paragraph 16, constitutes a conclusion of law and is therefore improper.

WHEREFORE, it is respectfully submitted that plaintiff's motion for summary judgment be denied.

s/ David G. Bress
United States Attorney

[Certificate of Service]

PLAINTIFF'S STATEMENT PURSUANT TO LOCAL RULE 9(h)

Plaintiff, pursuant to Local Civil Rule 9(h), submits the following statement of material facts as to which he contends there is no genuine issue of fact in the case:

1. That the complaint was filed on May 25th, 1966.
2. That the complaint has been amended.
3. That the plaintiff is an importer of foreign watches and/or watch movements.

4. That the plaintiff is a citizen of the United States.

5. That plaintiff pays a duty of approximately One Hundred (100%) Percent, ad valorem, on watches which he imports from Switzerland.

6. That watches and/or watch movements are brought into the United States, from the Virgin Islands, free of duty and free of markings as to origin, pursuant to General Headnote 3A, Section 1202, Title 19, formerly Section 301 of the Tariff Act of 1930.

7. That Treasury Decision number 54,821, is as quoted in plaintiff's memorandum, and constitutes a decision of the Treasury Department.

8. That Section 301 of the Tariff Act, now General Headnote 3A, Section 1202, Title 19, is as quoted in plaintiff's memorandum. That Section 301, aforementioned, was in force at the time of Treasury Decision 54,821, aforementioned.

9. That the Treasury Department was dissatisfied with the current situation with respect to duty free importations of watches from the Virgin Islands and asked Congress to change the situation by the introduction of H.R. 9320 in December, 1963.

10. That in January, 1964, Hamilton Watch Company, Bulova Watch Company, Elgin National Watch Company and United States Time Corp. sought legislation to stop completely the duty free importation of watches.

11. That the Virgin Islands is outside of the United States Customs Territory.

12. That importations to the Virgins Islands are examined by its own Customs Service.

13. That the Secretary of the Treasury and the Commissioner of Customs are charged with the enforcement of the United States Tariff Act.

14. That the Treasury, by its own rulings, requires certain procedures to be performed, in the Virgin Islands, by

Virgin Island watch manufacturers, prior to granting its duty free treatment. That said "duty free" treatment is certified by Treasury in the Virgin Islands.

15. That the United States of America is not engaged in the watch business, in any form whatsoever, in the Virgin Islands.

16. That plaintiff's only forum, if he has any forum, is the District Court of the United States.

17. That plaintiff is a member of a class of importers.

Respectfully submitted,

s/ Milton M. Jacobs

s/ Harold J. Nussbaum

[Filed Jan. 5, 1967]

NOTICE OF APPEAL

Notice is hereby given this 5th day of January, 1967, that Walter Kocher, Plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 9th day of November, 1966, in favor of Defendants Henry Fowler and Lester D. Johnson against said Walter Kocher.

s/ Harold J. Nussbaum

EXHIBIT NO. 2

To: Secretary of the Treasury
Washington, D.C.

Commissioner of Customs
2100 K Street, N.W.
Washington, D.C.

Protest: Re: Importation of Watch Movements from the Virgin Islands free of duty.

Honorable Sirs:

1. My name is Walter Kocher.

2. My address is 548 South Broadway, Tarrytown, New York.

3. I am engaged in the business of importing watches and watch movements into the United States of America, primarily of Swiss origin, production and/or manufacture.

4. I protest the rate of import duty on watch movements allegedly of Virgin Islands production and/or manufacture, imported into the United States of America from the Virgin Islands under TSUS 716:08 through 716:36, 717:7, 718:7 and 719:7.

5. By countless rulings of Deputy Commissioner of Customs, W. E. Higman, large quantities of watches and watch movements are entering the United States of America free of any duties.

6. By reason of such rulings:

a) The United States Treasury is annually deprived of approximately $10,000,000.00 in duties that would ordinarily be collected were these watches and watch movements declared to be the product of Russia, Japan, West Germany, Switzerland and/or France.

b) The United States Treasury is annually deprived of estimated income taxes of approximately $3,000,000.00 which would be earned in the Continental United States were these watches and watch movements

declared to be the product of Russia, Japan, West Germany, Switzerland and/or France.

c) That in my importations of watches and watch movements from Switzerland, I am placed at an unfair, and I believe illegal, competitive disadvantage.

d) That so called manufacturers or producers of watch movements in the Virgin Islands, in order to establish values, to comply with the requisite content of 50% or less of value in foreign materials, sell to parents, subsidiaries, or related firms, and that such values so submitted are not on the open market and do not constitute arms length transactions as the law contemplates. That to effectuate sales the so called American related firms of the alleged Virgin Islands manufacturers of watch movements can offer free casing, free movements and other inducements, and can possibly sell at prices lower than the entry value. That the process can be a harbor of maintaining profits in the Virgin Islands with special tax exempt status.

7. It is respectfully submitted that all entries made between related firms i.e., alleged manufacturers and or producers in the Virgin Islands and subsidiaries, parents, and or other related firms are not at arms length, and are for the purpose of establishing values, which should not be accepted by the government as establishing true values. That all entries so made in the past should be re-examined and the full duty imposed. That Customs Law provides, as follows:

> "by payment in full of all duties legally accruing. It may be enforced notwithstanding the fact that an erroneous construction of law or regulation may have enabled the importer to pass his goods through the Custom house without such payment."

8. That customary practice in the enforcement of United States Treasury Department regulations to determine values is the price at which the commodity would change

hands between a willing buyer and a willing seller, neither being under compulsion to buy or sell. In other words, bona fides sales. It is respectfully submitted that sales between parents and subsidiaries or vice versa are not free and untramelled and bonafides within the contemplation of the usual laws and regulations enforced by the United States Treasury.

9. Your office is directed to the fact that the importations subject of this complaint are shipped from the Virgin Islands pursuant to a form signed by Chief or Assistant Chief of Customs at the Port of shipment. Protest is likewise directed to the issuance of the aforementioned form or Certificate by the United States Customs officer at the Port of shipment, as well as to the entry, which customarily is the Port of New York, as well as to the rulings herein of the Deputy Commissioner of U.S. Customs, Mr. W.E. Higman. It is further claimed that the watch movements imported from the Virgin Islands are not the product or of manufacture of the Virgin Islands, but on information and belief are the products of Russia, Japan, Switzerland, Western Germany, and/or France.

10. Upon information and belief, the present population of the Virgin Islands is about 33,000 persons, that at most between 2% and 3% of said population is engaged in the business of allegedly producing and or manufacturing watch movements; that there is currently being imported into the United States of America from the Virgin Islands watch movements at the rate of 4,000,000 pieces per annum, and that said rate shows every indication of increasing; that Virgin Islands labor is admittedly unskilled; that the alleged quantity of production is far beyond the rate of production of any skilled country's labor pool. That the watch movements, on information and belief, are not the produce of the Virgin Islands, but are in truth the produce of Russia, Japan, Switzerland, Western Germany and/or France.

11. That upon information and belief, the alleged production or manufacture of watch movements in the Virgin Islands is a sham, and that the production is not truly that of the Virgin Islands.

12. That if a finding be made, reversing previous rulings with respect to Virgin Islands, production of watch movements, that said reversal be retroactively enforced in accordance with Customs Duties Regulations, and the duties be collected in accordance with law and U.S. Customs Regulations.

WHEREFORE IT IS RESPECTFULLY REQUESTED

a) That this protest be filed.

b) That a decision be made by the Secretary of the Treasury and/or The Commissioner of Customs.

c) That shipments of watch movements from the Virgin Islands to related firms cease, as same are not transactions between a willing seller and a willing buyer in the usual interpretation; and that full duties be imposed retroactively on all such shipments now attempted or hereinbefore consummated.

d) That United States Customs cease to issue certificates of origin to Virgin Islands currect production of watch movements, and that duties be imposed currently and retroactively on all shipments of watch movements from the Virgin Islands to the United States.

Respectfully submitted,

s/ Walter Kocher

Milton M. Jacobs

EXHIBIT NO. 3C

United States Tariff Commission
Washington, D.C.

September 28, 1965

Milton M. Jacobs, Esq.
475 Fifth Avenue
New York, New York 10017

Dear Sir:

You were informed in a recent Treasury Department letter that copies of your correspondence of August 2, 1965, addressed to the Attorney General and the Secretary of the Treasury concerning the importation of watches from the Virgin Islands had been forwarded to this agency for any necessary comment.

In your letter to the Attorney General you quoted from the Commission report of March 5, 1965, to the President of the United States, under section 351(d)(2) of the Trade Expansion Act of 1962 (TEA) concerning the probable economic effect on the domestic watch industry of the reduction or termination of an increase in, or imposition of any duty or import restriction made pursuant to section 351 of TEA or section 7 of the Trade Agreements Extension Act of 1951. The quotation referred specifically to the assembly operations in the Virgin Islands whereby domestic importers avoid the higher duties on watch movements imported directly from foreign countries. We wish to point out that in making this particular statement we were not inferring that the avoidance was not lawful or proper under the law. As an example of lawful avoidance of duties, whenever the merchandise is so fashioned or produced that it is subject to a lower rate of duty upon importation instead of the higher rate if imported in a different condition, this would amount to an avoidance of the higher rate but it would certainly be legitimate. This lawful avoidance of duties was that which the Commission was pointing out—importations made under the provisions

of General Headnote 3(a), page 11, Tariff Schedules of the United States.

Your correspondence, of course, does not raise questions within the purview of this agency and we have no other comments to make. Although you are probably aware of pending legislation concerning the Virgin Islands operation with respect to watches, we refer you to H.R. 8436 which has been introduced in the House of Representatives. This bill apparently would amend the insular possessions provision, General Headnote 3(a), Tariff Schedules of the United States. It is also understood that the Virgin Island legislature has enacted legislation whereby quotas will be established as to the number of watches to be produced in the Islands for the United States market.

Sincerely yours,

/s/ Donn N. Bent, Secretary
By direction of the Commission

EXHIBIT NO. 3D

Treasury Department
Washington, D.C.

August 20, 1965

Dear Mr. Jacobs:

With your letter of August 2, 1965, which pertains to watch movements imported from the Virgin Islands, you enclose the following:

1. A copy of a letter to the United States Attorney General;

2. A copy of a transmittal letter to the Secretary of the Interior;

3. A copy of a document titled "Protest: Re: Importation of watch movements from the Virgin Islands free of duty," signed by Mr. Walter Kocher.

The original of Mr. Kocher's document was transmitted to the Bureau of Customs by you in a letter of July 23, 1965.

Watch movements which are imported into the United States from the Virgin Islands free of duty are entered under General Headnote 3(a), Tariff Schedules of the United States. General Headnote 3(a) provides, in part, for free entry of articles manufactured or produced in certain insular possessions of the United States from materials the growth, product, or manufacture of any such possession, or of the United States, or of both, which do not contain foreign materials to the value of more than 50 percent of their total value.

Duty-free entry into the United States under the provisions of General Headnote 3(a), Tariff Schedules of the United States, is accorded only to those watches and watch movements from the Virgin Islands which have been assembled there by a process constituting a manufacture or production, and which meet the value limitations of that provision of law.

Watches (movements and cases) and watch movements imported from the Virgin Islands are appraised under section 402 of the Tariff Act of 1930, as amended.

The structure of sales from the Virgin Islands to the United States has been found to include sales directly to unrelated purchasers; sales directly to subsidiaries or related purchasers; and sales through selling agents or representatives in the United States to unrelated purchasers. All sales to the United States are made at the same prices regardless of category of purchaser.

Accordingly, where such or similar merchandise is sold to related and unrelated purchasers at a uniform unit price which fairly reflects market value, such price would properly form the basis of statutory appraised value.

You refer to a report prepared by the United States Tariff Commission relating to watch movements assembled in the Virgin Islands. Your correspondence, along with a copy of this letter, is being forwarded to that agency for its comments.

Sincerely yours,

s/ James Pomeroy Hendrick
Acting Assistant Secretary of
the Treasury

Milton M. Jacobs

EXHIBIT NO. 6

Milton M. Jacobs
475 Fifth Avenue, New York, N. Y.

March 11th, 1966

Hon. Robert F. Kennedy
United States Senate
Washington, D.C.

Re: Importation of watches from the Virgin Islands.

Dear Senator:

I have carefully read the correspondence of Hon. True Davis, Assistant Secretary of the Treasury, with reference to the above matter.

I sincerely believe that the Assistant Secretary of the Treasury does not have possession of all the facts, and I say this with deep respect for him, his past performance, and his office.

First, he writes me in a vein that it would be improbable for Virgin Island assemblers of watches to purchase watches that were completed movements in their country of origin (largely Japan, and several other countries) have them dis-assembled in the country of origin, and then re-assembled in the Virgin Islands to contrive compliance with

the old Section 301 of the Tariff Act (Insular Possessions Act). Of course, there is pending in his own department, assessments made by U.S. Customs in a pending matter where it is alleged that movements completed in Switzerland were allegedly sent to Pforsheim, Germany, disassembled and then re-assembled in the Virgin Islands for a contrived compliance with the provisions of Section 301 of the Tariff Act.

Secondly, the attached letter will indicate that the bulk of the Virgin Island watches are Japanese, and that they largely come into this country, free of duty, as a contrived compliance with Section 301.

Thirdly, the loss to our federal government will shortly approach $20,000,000.00 per annum in duties. Actually, by this process Japanese watches are coming into our market, these United States of America, free of duty and free of label.

The Japanese, themselves, in their press release before the March 7th, 1966 Federal Trade Commission hearings, calculate their shipments to the Virgin Islands in terms of complete watches. (Top of Page Three, Statement of Japan Watch and Clock Association before the Federal Trade Commission March 7th, 1966.)

The Japanese admit to putting together one out of every twenty watch movements, but they deny that all their watch movements were completed prior to shipment to the Virgin Islands. At least 5% or 250,000 units more or less are admittedly once completed watch movements, and eventually enter our commerce.

However, their motion picture of their method of manufacture, in the opinion of expert technicians, indicate their movements must be completed and then dis-assembled for the purpose of contrivance to comply with Section 301. Their assembly lines would have to be radically changed. Mere bland denials by their spokesman, not under oath, and without Treasury investigation in Japanese factories as to actual manufacture, should not be sufficient to deprive our government of $20,000,000.00 annually in duties.

In the 1930's there was a method of knocking down or taking apart completed Swiss movements in Switzerland, and then re-assembling the parts in the United States. The Virgin Island operation with Japanese components seems to have an odor of this old operation, which was stopped by U.S. Customs years ago.

If I am right, and I have good reason to believe that I am, the least that Treasury can do is to bring the matter out in the open, with cross examination of witnesses, under oath, particularly those responsible for the Virgin Island operation. The only thing that could possibly happen is the collection of millions and millions of dollars in duties. My 47th Street importers of Swiss watches, and I listed a sizeable number at the March 7th, 1966 Federal Trade Commission hearings, are suffering badly, and feel discriminated against, in that they pay full duties, averaging 100% of value, and largely Japanese watches come into the United States, free of duty, via the Virgin Islands. (The statements of Henry Margolus, Esq. as President of Elgin in 1965, Mr. Sinkler as to foreign origin of Virgin Islands watches, and Ben Noble on March 7th, 1966 before the Federal Trade Commission on behalf of Waltham Watch Company all prove interesting in this regard.)

At least, Treasury should make some attempt to re-examine its position, or in the alternative, get a court ruling, with industry appearing as amicus curiae.

Fourthly, Bulova Watch Company of New York City, and New York State has moved into the Virgin Islands with a huge production. Although the issue is not provincial, we cannot afford to give away jobs and tax dollars in this locality.

Fifthly, there is moral justice to which my 47th Street clients are entitled.

Please note that almost every one of the major watch companies which entered into the profitable Virgin Island watch traffic has piously proclaimed for home consumption that they "go there in self defense."

Certainly, I am grateful to you for your efforts in opening this matter before the Federal Trade Commission. With the brilliance of the present Federal Trade Commissioners, and their manner of questioning witnesses, it would seem that we will adopt some form of the European system of marking countries of origin, and these watch movements eventually will indicate to the consumer their Japanese origin, and not parade without marking under the inference, that they were made in the U.S.A.

Thank you again.

Sincerely,

s/ Milton M. Jacobs

EXHIBIT NO. 8

Treasury Department
Washington, D.C.

March 1, 1966

Dear Mr. Jacobs:

In your letter of January 26, 1966, on behalf of certain watch importers, you again refer to the competitive watch movements which are assembled in the Virgin Islands.

You ask, in effect, whether watch movements which were completed, timed, and disassembled in a foreign country, then imported into the Virgin Islands under circumstances not resulting in entireties and re-assembled there, would be considered as articles the manufacture or production of those islands within the meaning of General Headnote 3(a), Tariff Schedules of the United States.

In view of the economic infeasibility of assembling and disassembling a watch movement, and of re-matching into the original assembly watch movement parts which are imported into the Virgin Islands in commercial quantities, your question does not appear to be a realistic one. With

respect to the timing operation, however, that is merely one stage in the manufacture of a watch movement. The timing abroad of the balance wheel, or of the subassembly of which the balance wheel is a part, does not preclude the use of that part or subassembly in a further process of manufacture in the Virgin Islands. Completed watch movements may be manufactured there with the use of such component parts and subassemblies.

Sincerely yours,

s/ True Davis

EXHIBIT NO. 12

[Excerpt from Minutes of hearings of the Committee to Advise the Government of the Virgin Islands]

* * *

Chairman Feldman: Mr. Margolis, representing Master Time.

Mr. Margolis: Mr. Chairman, I would like to make these few comments and then—

Chairman Feldman: Do you have a written statement of any kind?

Mr. Margolis: We will make a statement for the July 9th hearing.

Master Time is controlled by the Elgin Company. As such, we wear two hats.

I would like to state to this Board that, using that famous "emperor wears no clothes" setup, there is no real watch industry as recognized throughout the world in the Virgin Islands. All efforts there, all competitive features work within tax duty. That is known to everybody in this room.

No parts are manufactured there. No complete assembly is made except in minimal amounts.

We find the domestic watch industry under great threat of extinction. We find that our production has of necessity been lowered

The present imports from the Virgin Islands far exceed the entire domestic watch production. This is as great a threat as movements coming in from Japan, from Switzerland, from [25] Germany, France, and the rest. It is about time we faced that reality and took it in its proper context of saying we go there merely in self-defense. It has no bearing on the watch industry.

We have said: Put us out of business in the Virgin Islands. It certainly doesn't indicate any particular self-interest; and, frankly, we make more on the watch movement there than we would in domestic production. But if it is the purpose to completely wipe out the domestic industry, you couldn't do it in better form than this runaway production in the Virgin Islands.

The rate I am told is running practically at 4 million units. Taking away the tweedle-dum—

Chairman Feldman: Where do you get the basis for the statement 4 million?

Mr. Margolis: The first quarter production of this year. Last year it was 2,300,000, still almost twice the entire domestic production.

Taking away the tweedle-dum and tweedle-dee, the jeweled-lever production is not the same as a pin-lever production by a long shot. The jeweled-lever consumption in the United States is about 10,900,000, and just last year's production is a really healthy percent of the entire market.

* * *

EXHIBIT NO. 13

[Excerpts from hearing before the Federal Trade Commission, March, 1965]

* * *

[104] Chairman Dixon: We hear next from Mr. Ben Paul Noble, Noble & Barnes, representing Waltham Watch Company.

Statement of Ben Paul Noble, Esq., Noble & Barnes, Representing Waltham Watch Company

Mr. Noble: Chairman Dixon and distinguished members of the Commission. I appear here on behalf of the Waltham Watch Company which is subject to several orders, the enforcement of which is based on part as a result of this hearing, I assume.

* * *

[206] Waltham, incidentally, does not import any foreign parts and assemble them in this country and has not done so at least, since 1957. Waltham became an importer principally from Switzerland prior to 1957 and while the company was still under the management of its original Massachusetts Foundation of Corporate Enterprise, which was, incidentally, incorporated in Massachusetts in 1923 and had preserved in Waltham in that state since– 19– since 1849, but not as a corporation.

Proceeding, then, to the next question in the commission's inquiry, the assembly in the Virgin Islands of watch movements, because Waltham buys only watch movements in the Virgin Islands. It does not buy complete watches in the Virgin Islands.

Waltham has stayed out of the Virgin Islands market on the advice of its Federal Trade Commission counsel until about 1963, and since 1963 it has delved into that market by force of competition in increasing volume, as the written report submitted to the Commissioners will reflect.

[207] Chairman Dixon: Why was that necessary?

Mr. Noble: Competition costs-wise. What one does–

what the competition does, the rest of us sooner or later will have to do cost-wise in order to stay in the market.

Commissioner MacIntyre: It is a price difference in the matter of competition that forces it?

Mr. Noble: Yes.

Now, Waltham consequently, on the advice of its FTC counsel, did not go into the Virgin Islands in much the same manner as did its competition and holds no name or facilities in those Islands.

Chairman Dixon: You are speaking of yourself now and not a member of the FTC staff?

Mr. Noble: Yes, sir, I am speaking of myself.

Consequently, when it moved into the market, it was forced to buy from available sources. Accordingly, the information which it submitted to the Commission and will submit now with respect to its foreign origin of the parts assembled in the Virgin Islands is based on the available information which is largely opinion, and to some extent, hearsay, but submitted for what value it may have. Because the Company itself has no control over the purchasing mechanism of its suppliers. However, its experts have examined and do for the most part know the relative percentages—the relative percentages.

As the Commission will note, Waltham suppliers are [208] furnishing Waltham movements in the Virgin Islands composed of two basic components—component sub-assemblies. Contrary to what I heard other witnesses state before this hearing on January 7, Waltham's experience differs from that of others who testified in that it is impossible under the system as they prescribe it for one of the sub-assemblies to come from, say, France, and in order to come from Germany or Japan. According to my information, based on the opinion of Waltham's experts, when one of the two sub-assemblies comes from Japan and the other one will come from Japan. When one comes from France the other will come from France and the third source used by Waltham in the relative volume shown is Germany and I assume this is West Germany, and when one comes from

West Germany the other will come from West Germany. So there can be no commingling of countries of origin with reference to the assembly of a movement insofar as I know in the Virgin Islands.

However, it is my understanding that certain other parts not included in the two compact sub-assemblies such as, for instance, the dial and the face of the watch are usually imported into the Virgin Islands by the assemblers from the United States.

Now, these two sub-assemblies in turn are broken down in such a manner, and I understand that the manner is systematically organized so that one of them is always being designated A and one B. The parts in A and B may be reversed [209] but the parts will always be the same under one designation or the other. Essentially, the principal parts on a watch, that is, the mechanism and the real guts of a watch are in one sense—and the incidental components—it is broken down in the country of origin—Japan, Germany or France—in Waltham's case in such a way that the assembly operation in the Virgin Islands will require nine procedures, so that there are nine operations involved in the two compact sub-assemblies. The relative value of the two sub-assemblies is approximately six to one, based on Waltham's experience, that is, the principal sub-assembly consisting of the guts of the watch, the train of the escapement will be valued at approximately in terms of cost at six times the secondary sub-assembly contained in the minor components. And its evaluation of course in Waltham's case has to be based upon its cost and that ratio has been determined to be six to one.

Now, in order to meet the requirements of the Treasury Department, a watch assembler producing the Virgin Islands must, as I understand it, be approved in two respects.

Number one—well, generally speaking, it must be determined that the watch movement as produced in the Virgin Islands is a product of the Virgin Islands and in order to do so its value must be enhanced by 50 per cent in the Virgin Islands with labor and materials indigenous to those islands.

I submit that frequently this is accomplished by merely [210] doubling the price to the American consumer and in most cases, but not in Waltham's, the American consumer would be the parent corporation of the Virgin Islands Corporation.

The second requirement of the Treasury Department after the determination of value is that the nine procedures—and I believe this is regulation of the Secretary of the Treasury, I am not sure—nine procedures must be involved in the assembly operation, hence the breakdown into the systematic two compact components that I described earlier.

* * *

[220] Miss Jones: How many employees do you have in the Virgin Islands doing your assembly work?

Mr. Noble: Waltham has no facilities in the Virgin Islands. If Your Honor please. We purchase in the Virgin Islands from suppliers.

Miss Jones: How many employees do they have?

Mr. Noble: I really don't know.

Miss Jones: Do you know anything about their training?

Mr. Noble: I understand—it is my understanding that the training required in order to assemble the components sent from the foreign countries is minimal—involves finger dexterity. The employees are normally women and somewhere in the neighborhood of 12 to 15 employees can produce on an assembly line somewhere in the neighborhood of 5000 watches a month.

Miss Jones: You are suggesting that the place of assembly should be the criterion of the manufacturer of the [221] watch?

Mr. Noble: Yes. And if we don't it is done in the Virgin Islands, we should have Congress amend the legislation.

Miss Jones: You don't think the Congressional legislation has anything to do with what is true of the manufacturer, of the quality of the watch?

Mr. Noble: Well, you have got parts of a watch coming into the Virgin Islands, as far as Waltham knows, from

France, Japan and Germany. I have heard testimony that it is coming from other countries—even Russia and East Germany. What kind of a marking would fairly disclose to the consumer the country of origin of watches? The Commissioners must understand that watch companies produce lines of watches, that is, models, and every model has a style number and a style name.

Miss Jones: You are suggesting to us, as counsel, that we should take a criterion of place of assembly as being the place of origin? This means that the watches that you describe, made in the Virgin Islands, 5000 produced by some 12 employees, a month, when, as I understand it, there is one watch in Switzerland where they produce 20 in a year, and you are suggesting that that assembly should be regarded as an American watch comparable to the old watch that Waltham used to make, that Elgin and Bulova make, and you don't think that is a deception on the consumer?

[222] Mr. Noble: I suggest, even though it is produced in limited quantity—it keeps the market up, not that they are hard to produce.

Miss Jones: It tends to show that the assembled watch can be a highly, intricate, careful, delicate affair, that goes to the basis of the quality of the watch. I cannot believe, when you describe assembly of producing 5000 watches, and these must be very large assemblies, that somebody can put together—

Mr. Noble: What is involved in a pre-assembly might be of interest here. You see, the watches are really manufactured—and let's face the fact there is—there has been a loophole in the tariff act. The question is whether or not it should be closed. They are really assembled in Japan, they are really assembled in France, they are really assembled in wherever the parts come from.

Miss Jones: Yet you are asking us to make the last place of assembly?

Mr. Noble: They are broken down, Your Honor, into the sub-assemblies that I described earlier to facilitate nine operations which Congress says constitutes a manufacture

in the Virgin Islands, if you do it under the regulations.

Miss Jones: For purposes of customs, and tariff. But that doesn't mean that we have to adopt the same definition of manufacture for purposes of preventing deception to the [223] consumer, I agree with you, I think those watches are manufactured in France or Japan, are broken down. With your definition of "assembly" you are suggesting we should consider them an American watch.

Mr. Noble: Consider them—I submit to Your Honor, I know from personal experience—I forget which case it was involved in—if you mark "Japan" on a watch movement assembled in the Virgin Islands, you could not bring it into the United States with the marking of "Japan" on it. Because, as far as Treasury which is sitting there at the door of entry is concerned, that is a Virgin Islands watch; that is why I submit, Your Honor, that you have a legislative problem if it is to be cured. As far as Treasury is concerned, that is a Virgin Islands watch because it has met the requirements of the Treasury Department under the statute.

* * *

[350]

Statement of Mr. Allen V. Tornek,
Allen V. Tornek Company

Mr. Tornek: Mr. Chairman, Your Honors. My name is Allen V. Tornek, my company is Allen V. Tornek Co. Inc. I am a watch importer in the City of New York.

Incidentally, I am not a member of the American Watch Association.

I shall try to confine my remarks as briefly as possible and get to my point so that I can offer you the most time to adjourn this hearing.

I cannot help but reflect on a remark that was made by Mr. Lewin earlier in which he very carefully made it a point to indicate to this Committee that he sent out a questionnaire to 500 Zale Jewelry Stores. I don't know if it is known to Your Honors that the Zale Jewelry Company

owns a standing interest in a Virgin Islands watch producer. Zale Jewelry Co. fosters the sale of Baylor watches and Elgin watches mainly, and I just wonder—in reflecting Mr. Lewin's remarks, whether or not these managers of the Zale stores are aware of the fact that their head office owns a standing interest in the Virgin Islands Co.

Chairman Dixon: If we didn't know we know how now. Proceed.

Mr. Tornek: Okay, fine.

In April, 1959—and I am sorry I have to be a little [351] redundant in this respect—when this Treasury decision was published relative to the Assembly of Movements in the Virgin Islands, this decision stated in part, "Watch movements of various parts imported separately into that possession in circumstances not constituting an entirety, results in articles manufactured or produced in that possession entitled to free entry provided the value requirements of Section 301, Tariff Act of 1930, as amended, are met and there is a compliance with the pertinent regulations." After consulting rather unsuccessfully with U.S. Customs offices in New York, who were very noncommittal as to the interpretation of this new regulation at that time, I had Mr. William T. Smith, my Washington representative consult with the Treasury Department in Washington and also the Department of Interior for clarification of the Treasury decision mentioned above.

Mr. Smith managed to obtain a meeting for me at the Department of Interior and after I went there I advised to visit the Virgin Islands and make an on-the-spot check in order to establish a manufacturing facility in St. Croix.

About February 1, 1960, I went to St. Croix with Mr. Smith, met with a number of Virgin Islands Government officials and leased a building in Frederiksted, St. Croix. I don't know if it interests the Court, but I have a picture of the building and a rent receipt for the transaction.

Chairman Dixon: No, sir.

[352] Mr. Tornek: Shortly thereafter I went to Switzerland, Germany and France to purchase the necessary parts in order to commence an assembly operation. I quickly determined that unless the movements were pre-assembled and timed, the knockdown in a minimal fashion, and I won't go into an explanation of this minimal fashion because the record is replete with this explanation by now and also the method in which these movements must be brought into the Virgin Islands in order to conform to the Tariff Act, et cetera, et cetera, I found very quickly that it would be practical impossibility to assemble a watch and have it keep time within several minutes.

Of course, my company did not lack the capital, horological or any of the necessary attributes to set up this sham operation. I do not intend to take the time of the court today to burden you with technical dissertations that has already been gone through on these sham operations and methods of assembly. I believe all 13 out of 14 companies in the Virgin Islands who are handling three-and-a-half million watch movements this year are engaging in it. I know that the record is already replete with evidence and exhibits going back to the hearings of last May 27, in Washington, and also your recent trodden report that was prepared by your investigator in New York.

Furthermore, the U.S. Department of Labor report, which you already have in the record, clearly brings forth the [353] necessary statistics to prove completely that it would be impossible for 479 unskilled people to assemble or touch up—I don't know what the correct terminology is at this point—three-and-a-half million movements.

There are approximately 130 separate parts in this 17 jewel, 11½ line sweep movement. I quote this from a very nice book that is put out by the F.H. which has many other explanations of Swiss movements.

Commissioner Jones: I am not sure that the Commission knows what the F.H. is. Is that Swiss watches, Mr. Tornek?

Mr. Tornek: Federacion Horologie.

Anyone in the watch industry having any knowledge about watch making or manufacturing must admit that you simply do not mix parts, as Mr. Gasser displayed before, and I know that Mr. Gasser is a very capable and able horologist, and a man of great many years of experience and I respect him for his abilities, but this now becomes a question of who is right, who is wrong, and how do we investigate it and how do we document it and so on? I assure you gentlemen that you simply do not take watch parts from a knockdown condition—and I haven't had an opportunity to study the displays that Mr. Gasser presented here today and then give them to a great many unskilled people and then produce 5,000 a week. This is virtually impossible. I would stake my reputation on it.

Chairman Dixon: What would your reputation say if [354] they make 5,000 a week, where are they coming from? Take a look at it.

Mr. Tornek: I noticed Mr. Gasser made it a point to speak about four little parts manufactured in New York City or U.S. If these sub-assemblies came from Japan, without these four little parts, or if they came with the little parts and they threw them away, and then took these insignificant parts and inserted them in the movement, the movement would still run. So I don't think that is a great manufacturing contribution to the working facility of the watch.

Commissioner Reilly: Even if it were impossible, if we accepted everything you said what would that have to do with what we are trying to decide today?

Mr. Tornek: I would like to get to that point as quickly as possible.

Chairman Dixon: What we are trying to determine is—even if everything you say, as Commissioner Reilly says, is taken as true, we have got the question—the question we have is, assemblies of parts or assemblies of subassemblies

that result in a watch being offered as sold in the domestic market in the United States without any revelation on it where any of the components or where the watch itself primarily was manufactured.

Mr. Tornek: Yes, sir, I understand your point very clearly. While I was in Switzerland only three weeks ago, to [355] prove a point along these lines, I was successful in obtaining two Chinese watches. These watches are made in Red China, which is a prohibitive country, and I would like to show Your Honors an example of how a fraud perpetrated on the American public. I hate to go back, and I know your record already has this article. It is that famous article that was published in the New York Daily News in 1962, and the remarks were made very forcefully by General Omar Bradley in which he stated that he thinks that the Treasury Department should take another look—see at whatever is going on in the Virgin Islands, and this as you recall was a picture of a Russian movement—if you will, please—listen to this description: Precision-made, 17 jewel Russian Korovsky watch, lacking USSR identification awaits duty-free shipment from Virgin Islands to sell in the United States at less than $10.00.

Obviously, Mr. Bradley thought this was an honorable thing, that there was a Russian watch, unmarked, coming into the United States. Since then Bulova has made history. They are now in the Virgin Islands and they will be producing the greatest amount of watches from the Virgin Islands. But now, getting back to this Chinese communist watch—

* * *

EXHIBIT NO. 20

[Excerpt from "Industry in the Virgin Islands," Sept. 1965, U.S. Department of Labor Review of Minimum Wage Rates Under Fair Labor Standards Act, pages 32 et seq.]

* * *

VI. The Jewelry, Pen, Thermometer, Industrial Belting and Miscellaneous Metal Products Industry.

The Jewelry, Pen, Thermometer, Industrial Belting and Miscellaneous Metal Products Industry in the Virgin Islands is defined for wage order purposes as follows:

> The manufacture of precious and costume jewelry, watchbands, cigarette lighters, scissors, fishing rods and reels, binoculars, ball point pens, thermometers, metal floor dividers, industrial belting and parts therefore, and the assembling and manufacture of clocks and watches.

At the present time there are two minimum wage rates in effect for the industry in the Virgin Islands. A minimum wage rate of $1.15 an hour for the Clock, Watch and Watch Band Classification and $1.00 an hour for the General Classification. The Clock, Watch and Watch Band Classification includes the assembly and manufacture of clocks, watches and watch bands. All other activities are grouped in the General Classification.

A. The Clock, Watch and Watch Band Classification

1. *Description of firms*

The April 1965 survey included 12 firms in the Clock, Watch and Watch Band Classification with 474 employees, including seven learners, covered by the Fair Labor Standards Act. Eleven of the 12 firms were engaged in the assembly of watch movements and one firm made watch bands. Ten of the firms are affiliated with mainland companies and one of these also has an affiliation with a company in West Germany. Five of the firms were operating under tax exemptions; six had applications pending; and one had appealed the denial of a request for tax exemption. Only four of the firms were operating under labor union contracts at the time of the survey. Four firms making watch movements have entered the industry since 1963. Selected

characteristics for each of the firms are presented in Table 37, page F-1.

2. *Production*

Production of watch movements in the Virgin Islands, begun in 1959, consists almost entirely of jeweled-lever movements, largely of the 8-jewel or more variety (Table 43, page F-26). Almost all of these movements are shipped to the United States mainland for final assembly and sale as complete watches. In 1964, the number of watch movements shipped from the Virgin Islands to other parts of the United States (2.4 million units) was about twice the number of jeweled-lever movements produced in the United States. Virtually all of the movements shipped from the Virgin Islands to the States are of jeweled-lever construction and cost less than either domestically produced or imported jeweled-lever movements of equal quality.

EXCERPTS FROM HEARING BEFORE THE COMMITTEE ON FINANCE

[United States Senate, Eighty-Ninth Congress, Second Session on H.R. 8436]

From Russell Giles, General Counsel of the Department of Commerce.

Washington, D.C., February 18, 1966.

Hon. Russell B. Long,
Chairman, Committee on Finance,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman:

This is in further reply to your request for the views of the Department of Commerce with respect to H.R. 8436, an act "To amend the Tariff Schedules of the United States

with respect to the dutiable status of watches, clocks, and timing apparatus from insular possessions of the United States."

If enacted, H.R. 8436 would amend paragraph (a) of General Headnote 3 of Title 1 of the Tariff Act of 1930 (Tariff Schedules of the United States; 28 F.R., part II, page 11, August 17, 1963; 77A Stat. 11). In effect, the amendment would remove articles covered by schedule 7, part 2, subpart E (relating to watches, clocks, and timing apparatus) from the duty-free status allowed certain articles containing dutiable foreign materials coming into the United States from its insular possessions, except for such articles entered from the Virgin Islands. Further, the amendment would apply only with respect to articles entered, or withdrawn from warehouses, for consumption after the one hundred eightieth day after the date of enactment of this bill.

Under General Headnote 3(a) of the Tariff Schedules of the United States an article can be shipped duty-free into the United States from its insular possessions if the value of the foreign materials contained in the article is not more than 50 percent of its total value. Under present customs practice this test can be met in many instances with only token processing of foreign dutiable materials in the insular possessions. As a result, undesirable tariff avoidance practices have arisen.

This Department has been concerned with operations under headnote 3(a) particularly with respect to commodities on which high U.S. rates of duty have been established by government action for the relief of a domestic industry. The watch assembly operations in the Virgin Islands are a case in point since most of the watch movements being assembled in the Virgin Islands would have been dutiable under escape clause rates of duty had they been imported directly from foreign countries into the United States. There also have been other cases in which foreign goods normally dutiable at rather high tariff rates have been im-

ported into the Virgin Islands where they are subjected to token processing in order to qualify under headnote 3(a) for duty-free entry into the United States. For example, the Virgin Islands Government found it necessary in 1963 to control the volume of production of wool textiles which were being subjected to a token waterproofing and entered into the United States free of duty.

Activities in the insular possessions involving only token processing of foreign dutiable materials and based on solely on the duty-free privilege of General Headnote 3(a) could subvert the purpose of that headnote of providing encouragement to economic development in the insular possessions. If let unchecked, such activities operating under an umbrella of rather high rates of duty on direct imports into the United States could also cause serious trade impact on domestic producers.

Thus, the problem created by watch assembly operations in the Virgin Islands or the spread of such operations to other insular possessions is only one area of concern with respect to duty-free entry of shipments from insular possessions. As the Committee is aware, the Administration is working on a proposal to amend headnote 3(a) so as to relate the duty-free privilege for shipments from the insular possessions more closely to the economic benefit resulting to the insular possessions.

This Department would support a general legislative solution to the tariff avoidance problem of General Headnote 3(a) applicable to all insular possessions in preference to a commodity-by-commodity amendment of that provision. On the other hand, the spread of watch assembly operations in the insular possessions encouraged by existing tariff avoidance possibilities of headnote 3(a) is an immediate and growing problem, as is recognized by H.R. 8436.

The Act is designed to prevent the further spread of the assembly of watch movements from foreign watch subassemblies and parts in the insular possessions for subsequent shipment into the United States customs territory

free of duty under General Headnote 3(a) of the Tariff Schedules of the United States. Watch assembly operations began in the Virgin Islands in 1959. These operations involve no manufacture of watch parts but merely the assembly of watch movements from foreign subassemblies and parts primarily for shipment into the United States customs territory free of duty. The watch subassemblies and parts of watches are currently being imported into the Virgin Islands from Japan, West Germany, France, the U.S.S.R., Switzerland and Hong Kong. Shipments of watch movements from the Virgin Islands to the United States increased from 5,000 units valued at $34,000 in 1959 to 3,221,458 units valued at $19,154,662 in the first eleven months of 1965. Such shipments virtually all consist of jeweled-lever movements. In 1965, they amounted to approximately 13 percent of apparent U.S. consumption of all watch movements and about one-third of jeweled-lever movements. Watch assembly operations began in Guam in November 1965 under circumstances, similar to those in the Virgin Islands. Discussions have also taken place with regard to the establishment of watch assembly facilities in American Samoa.

Hon. Russell B. Long
Chairman, Senate Finance Committee
U.S. Senate
Washington, D.C.

Dear Mr. Chairman:

Information has been requested on 1) the names, 2) ownership and, 3) the amount of any tax subsidy received by watch assembly plants in the Virgin Islands. There are sixteen watch assembly plants now operating in the Virgin Islands; their full names, according to information available in our files, are presented below. The ownership of six Virgin Islands plants by United States manufacturers of wrist watches or other products is expressly

stated in testimony, court actions or letters in our files. The remaining Virgin Islands companies are believed to be either subsidiaries of affiliates of non-manufacturing U.S. companies (e.g., wholesale or retail distributors), according to letters in our files, statements of company representatives, or informal reports from other government agencies. Ownership interest in this second group of nine companies, as well as in the one company believed to have a German affiliation, generally is not fully documented and frequently must be described as "on information and belief." We recommend that you verify whatever "clues" we can supply with information available to other government agencies.

1. *Subsidiaries of U.S. watch manufacturers or U.S. manufacturers of other products*

VIRGIN ISLAND COMPANY	*U. S. COMPANY*
Standard Time Corp.	Hamilton Watch Co.
Atlantic Time Products Corp.	Bulova Watch Co.
Master Time Co. Ltd.	Elgin National Watch Co.
Virgo Corp.	United States Time (parent company of Virgo is Timex; Bermuda)
Antilles Industries, Inc.	General Time Corp. (U. S. manufacturer of clocks and pocket watches, not wrist watches)
Quality Products, Inc.	Benrus Watch Co., Inc. (U.S. manufacturer of cases, not watches; subsidiary manufactures other timing devices)

2. *Subsidiaries or affiliates of other U.S. companies*

VIRGIN ISLAND COMPANY	*U. S. COMPANY*
Admiral Time, Inc.	Webster Watch.[1]
Unitime Corp.	Unisales (U.S. representative)

Senator Gore. How long does it take a worker to take what you receive from Japan or from Switzerland or Germany or from whatever source—how many hours and how many minutes of labor on the average is involved in assembling these instruments?

Governor Paiewonsky. I am not conversant with the watch industry to that extent.

Senator Gore. Somebody ought to know.

Governor Paiewonsky. But you do have members of the industry right here who can give you this information. What I do know—

Senator Gore. Would you mind—excuse me, complete your statement.

Governor Paiewonsky. What I could give you, I know that we have made a calculation based on the cost of labor that goes into the watch from the various firms, and it ranges from about 45 cents up to $1 per unit, depending on the type of assembly that is being done.

In other words, there are some firms that do the complete assembly. They take all of the parts that go into a watch, and they put it together. Other firms just put together subassemblies, and putting in subassemblies, of course, there is less labor

Our law in controlling the quota places emphasis on labor, so that more labor is put into the watch so that the benefits to the Virgin Islands would accrue from the 301 indirectly through the amount of labor that is paid per unit into the watch. But, the question of the comparison of what it would cost to assemble a watch in New York and the period of time, I think this can best be answered by people of the watch industry who will be testifying here.

May I say one other thing. That the wages paid to the persons in the watch industry in the Virgin Islands, we have tried to make them pay high wages, because we are trying to get a segment of the population trained in this as skilled labor. My understanding is that the labor pay is

Belair Time Corp.	Enicar.[1]
Multi Jewel Watch Corp.	Baldwin Bracelet.
R.W. Summers Time Corp.	Sheffield Watch, Pan-American trading.[1]
Virgiline Watch Co., Inc.	Henriline Watch Co., Inc.
Belmont Industries, Inc.	Leichter Watch Co.[1]
Watches, Inc.	A. Schwarcz & Son, Inc.
Sussex Watch Corp.	Croton Watch Co., Inc.[1]

3. *Other*

Roza Watch Corp.	German ownership interest.[1]

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[1] On information and belief.

STATEMENT OF GOVERNOR PAIEWONSKY OF THE VIRGIN ISLANDS

Senator Gore. I have seen a telegram which indicates that the production per employee in the Virgin Islands is far in excess of the production per employee in the continental United States. Now this production per employee, I take it, is the number of watches assembled, the number of watches completed. For instance, you have 600 or 800 employees that produce 3 or 4 million watches, produce, assemble or whatever you do. Now, could you explain to me the difference in the actual labor on watches, say, in New York and in the Virgin Islands?

Governor Paiewonsky. I am not conversant with what they do in New York, but I know in the Virgin Islands when some of the watch companies started, they brought in subassemblies, and they would put together maybe several subassemblies into a working unit.

$1.60 an hour, and it is considered a very good paying occupation in the Virgin Islands for this segment of the population that normally cannot get this type of employment, and that is the women.

Senator Gore. Please understand that my questions do not indicate any lack of sympathy with employment opportunities in the Virgin Islands.

Governor Paiewonsky. Yes.

Senator Gore. I know how badly jobs are needed there, everywhere as a matter of fact.

My questions are elementary, and I must apologize, Mr. Chairman. I have a meeting of the Senate Foreign Relations Committee with Secretary Ball at 10, and I must leave. But I wish that the chairman would direct the staff to prepare these comparable figures. I would like to know, for instance, if this per unit labor cost includes the salary of management. We ought to get this broken down in comparable terms with respect to these various locations, because the best I can make of it, and again let me say it is only preliminary, what we have here is a fight over who is going to get the benefit of the tariff concessions. I may be in error about this.

Governor Paiewonsky. Mr. Chairman, may I say this.

Senator Anderson. May I first ask the reporter to note in his notes here the request that Senator Gore has made. I will ask the staff to supply the record with the information requested by the Senator.

(The information requested by Senator Gore regarding comparable figures follows:)

Memo Prepared by the Staff of the Committee on Finance

On the basis of information furnished the staff, it appears that the value of labor included in assembling or producing a watch in the insular possessions of the United States ranges as follows: Guam (5 companies), 65 cents to $1; Virgin Islands (16 companies), 35 to 40 cents up to

$1.56 with one company reporting labor costs as high as $3 to $4 per movement.

Governor Paiewonsky. Mr. Chairman, may I just say this for the benefit of Senator Gore. That in giving the allocation on quota, we have taken exactly what you have said into consideration. No salaries of the executive staff or office staff enter into the picture. It is only the people who are actually working on the watches, and even the technical people who are brought in to teach them, whose salaries may range to about $10,000, we have limited this to the social security figure, so that our law definitely includes only the question of social security payments of the actual persons engaged in the production of the watches, and does not include managerial and office.

Senator Gore. And this amounts on the average to how much per instrument?

Governor Paiewonsky. This amounts to—it ranges in different areas, depending upon the amount of work that is performed—from about 45 cents per unit up to a little over $1 per unit.

Senator Gore. I must admit surprise at my rough calculations that in Guam it amounted to about 30 cents per instrument.

Governor Paiewonsky. Maybe the labor costs in Guam might be less.

Senator Gore. Yes.

Governor Paiewonsky. I do not know, and maybe they are putting together subassemblies.

Senator Gore. But the comparison between 30 cents and 45 cents is still not—

Governor Paiewonsky. I know.

Senator Gore. We are not talking about big amounts.

* * *

Senator Dirksen. You actually make watch movements in the Virgin Islands?

Governor Paiewonsky. We only assemble them, sir.

Senator Dirksen. No manufacturing of parts or sub-assemblies?

Governor Paiewonsky. Not at the moment. We do not manufacture. We just assemble them by putting the parts together to make a watch movement.

Senator Dirksen. So you get parts from France?

Governor Paiewonsky. We get parts from France.

Senator Dirksen. From Japan?

Governor Paiewonsky. From Japan.

Senator Dirksen. How many do you get from Japan?

Governor Paiewonsky. I do not have the statistics on that, but I am pretty sure that this is available and we can secure it and make it available to your staff.

(See p. 5, table 3)

Senator Dirksen. And how many do you get from the watch plants in this country?

Governor Paiewonsky. I think some of your watches, the major manufacturers are now in the Virgin Islands, like Hamilton, Bulova, and Benrus, and I think they will be sending down parts of their manufacture, the items that they manufacture for assembly, assembling with other parts.

Senator Dirksen. I see you get some from the Soviet Union. Here is a sheet relating to the value and source of Virgin Islands imports of watch products. It shows for 1965, 686,000 from the Soviet Union. Are you aware of that?

Governor Paiewonsky. Yes, sir. It was brought to my attention, and we were told that as long as the U. S. Customs does nothing against the importation, and there is no ban by U. S. Customs, and we have U. S. Customs in the

Virgin Islands, that this is permitted. It is permitted in the United States, it is permitted in the Virgin Islands. If there was a ban against it, we certainly would prohibit it.

Senator Dirksen. Now, I have been going through an awful lot of literature on this watch business. They talk about pin lever and some other type. What is the difference?

Governor Paiewonsky. All I know about watch movements is what I have learned in the Virgin Islands since the watch companies have come there. The pin level movements I understand is a very cheap type of movement. There are no jewels.

Senator Dirksen. No jewels?

Governor Paiewonsky. No jewels. It is not a jewel movement, and there are some with some jewels, but the main Swiss watch and what we produce in the Virgin Islands are the 17 jewel watch, and there is a duty, of course, on the 17 jewel.

* * *

The Chairman. Can you give me your figure? What do you estimate the labor component for the average watch to be? In other words, if you take the number of watches that the average working person assembles in an hour, and and then take that number and divide it through by the wage, the hourly wage that worker is making, what is the labor component on these watches?

Governor Paiewonsky. The labor component differs for different companies. It ranges from about 45 cents to over $1. The smaller companies, in some of the smaller companies there, the cost per unit is a little bit more. It depends on what they do to the watch. If they are just putting a few subassemblies together, the labor components is very small. If they rebuilt the watch, putting each component part into the watch, each little wheel or whatever goes into the movement of a watch together, then the persons putting this together would take a longer time and the actual

cost of the labor component in this must rise to a figure of close to $1. The average that we have so far of all, taking totals, averages out to between 65 and 66 cents.

The Chairman. The reason I ask that is this. The thought that occurs to me is that one fair answer to the problem might be to require that this value-added component be perhaps as much as 50 percent in terms of labor and actual administrative payroll in the islands.

Now, if you did that, you would have more employment, provided that these watch manufacturers could meet that requirement. That would mean for the fellow that has got the 45 cents value added in terms of labor, that he would have to do more fabricating. He would have to do more assembling, that is. He could still buy the parts, but he would have to, as you indicated, put in the flywheel and do something more to the watch than just screw gogether a subassembly.

Governor Paiewonsky. This is the basis of our control in setting the quota. Our requirement is that two-thirds of the weight is given to the payroll that actually goes into making the watch, and one-third is calculated on the basis of the units shipped. This is how each individual watch corporation receives their quota, on this calculation, doing exactly what you are saying.

The Chairman. My thought about it is that if the value-added component represented about 50 percent of the difference in the tariff, that the kind of quota that you are suggesting might be fair. And, of course, I still think that the case can be made that Guam and even Samoa ought to be treated equally, and that they should share at least to some extent in the quotas available, provided that they can meet the value-added requirement.

Now, I personally find very little sympathy with this thing, of letting somebody evade a $3 tariff by screwing on the back of these watches. A person with normal intelligence knowing how to find his way in and out of that plant should know how to learn that in about an hour, taking two parts and screwing them together.

Governor Paiewonsky. That is right.

The Chairman. If that is all there is to it, for the life of me, I can't see why we ought to permit that as a loophole to our tariff laws. This provision of 50 percent value added, as I understand it, was put into effect on the theory that the islands were actually going to add 50 percent to the value. It sounded good at the time, and then when it goes into effect and we start administering it we find that the 50 percent is made up principally by the markup.

Governor Paiewonsky. Yes.

The Chairman. Which is just a matter of charging more for some parts that are brought in, more than the cost to bring them in here. If that is all we are doing, it is just a subterfuge and it seems to me it has no place in the law.

My sympathies in the matter would tend to say insofar as you are providing employment and insofar as you can provide legitimate functions, fine. But I should think that you ought to have to add about 50 percent to the value in terms of actual labor, accounting, bookkeeping, supervision, whatever it is that actually goes into doing something to assemble these watches, rather than simply a gesture such as adding a strap to it and calling that an assembly.

* * *

STATEMENT OF ARTHUR SINKLER,
HAMILTON WATCH COMPANY

Senator Douglas. You say 150 employees in the Virgin Islands can produce more than 600 in the United States?

Mr. Sinkler. Certainly not. That should be corrected. The work that is done in the Virgin Islands is only the very simplest kind of assembly. All of the parts manufacturing and original assembly and the most difficult parts of the assembly around the escapement, balance, and hairspring is done in Japan. Then they are shipped partially assembled and in the Virgin Islands we just complete the assembly which is a very small part of the total. I think you can get some

idea of the amount of work done in the Virgin Islands from the fact that we can actually buy a complete movement from Japan at the same price that we have to pay for the parts for that movement in the Virgin Islands.

STATEMENT OF LEONARD B. SADOW, VICE PRESIDENT, LONGINES-WITTNAUER WATCH CO., INC.

Mr. Sadow. Gentlemen, my name is Leonard B. Sadow. I am vice president and counsel of the Longines-Wittnauer Watch Co., Inc., of New York City.

Our company employs approximately 500 people in the United States, and imports movements from Switzerland which are cased, braceleted, completed and sold throughout the United States.

I would point out at the beginning that there is an error in the committee's witness list. Although Longines-Wittnauer is a leading member of the American Watch Association, I am not here to speak for the AWA, but for my own company. In addition, 11 other U.S. watch importers and assemblers have asked to be associated with my testimony, and their names will be found at the end of this statement. Many others, large and small, would have, I believe, associated themselves with the testimony had time permitted.

While some of the company names may be unfamiliar to you, the watches which these companies market include many of the best known and most highly esteemed brands available in the United States. In addition to Longines, Wittnauer, LeCoultre, and Vacheron & Constantin, all marketed by Longines-Wittnauer, my own company, brands sold by our own group include: Gruen, Omega, Tissot, Movado, Rolex, Girard-Perregaux, Audemars-Piquet, Patek-Philippe, International, Zodiac, Louvic, Jules Jergensen, and Wyler.

As the committee knows, the unchecked growth of watch shipments to the U.S. mainland from U.S. insular possessions, principally from the Virgin Islands, constitutes a very serious discrimination against watch importers who

have to pay the duty. We warmly appreciate the effort this committee is making to bring the problem under control.

Senator Anderson. Mr. Sadow, can I ask a question at that point?

Mr. Sadow. Surely.

Senator Anderson. You list some very well-known names here associated with you. If we added to that Hamilton, Elgin, and Timex, what proportion, percentage of the American watch industry, would be represented here? It would be pretty heavy, would it not?

Mr. Sadow. It would be a guess, but I would say the vast majority.

Senator Anderson. Gruen, Omega, and all these others, it is a pretty fair share of the watch industry?

Mr. Sadow. Yes, Senator, the vast majority.

Frankly, we wish the committee would go beyond its announced plan to set a quota of 1.5 million units annually on watch shipments from U.S. insular possessions and, instead, withdraw the unwarranted duty-free privilege entirely with respect to watches and watch movements.

In its application to the watch industry, headnote 3(a) is simply a mechanism for the avoidance of duties. In effect, it permits watch movements to be imported indirectly and without the payment of duties from Japan, France, Russia, and other countries—not including Switzerland, which has not participated in the exploitation of this tariff loophole.

We feel that headnote 3(a) discriminates sharply and without justification against importers who pay the duty. Benefits to the insular possessions have been amazingly small in proportion to the duty collections which have been sacrificed by this provision.

We believe that this represents poor public policy. While we certainly think that U.S. watch tariffs are unreasonably high and should be reduced, our basic position is that all

classes of watch imports should be subject to the same tariff schedules, whatever they are.

In adopting this special tariff provision, Congress intended to promote manufacture and employment in the U.S. insular possessions. In practice, however, as far as the watch industry is concerned, this provision has proved to be an extremely inefficient way to achieve these ends.

What has been achieved, instead, is a free-flowing conduit through which millions of movements pass from the Virgin Islands to the mainland duty free, with only minor work in the Virgin Islands. This is a situation which the draftsmen of headnote 3(a) could not have visualized.

In 1965, imports from the Virgin Islands constituted about 25 percent of U.S. consumption of jeweled watch movements and about 11 percent of consumption of all types of watches. This represents a tremendous increase from the very modest beginnings in 1959, but the development of manufacturing facilities in the Virgin Islands and the utilization of islands personnel has been nowhere near as great.

Under headnote 3(a) a watch movement shipped to the mainland from the Virgin Islands or Guam is eligible for duty-free treatment if its sales price on the mainland is at least double the value of the foreign materials embodied in the movement, plus the cost of transporting these materials to the possession. If, for example, a watch movement contains parts and subassemblies plus transportation costs to a value of $3, it is only necessary for this movement to be capable of selling in the United States for $6.01 in order to enjoy duty-free treatment under headnote 3(a).

This requirement poses no real economic obstacle. Comparable jeweled-lever watch imports, subject to the tariff, are burdened with a duty of $2.70 to $3.85 and cannot possible compete in the same price range.

While this is a bad thing for importers who pay the duty, it is not such a good thing for the insular possessions. That is because the minimum mainland price bears no rela-

tion to total production cost—only to the portion of total cost expended on foreign materials. Since it is obviously inefficient to produce parts of a watch in some country—say Japan—and other parts in the territories, where labor is relatively costly and unskilled, the practical effect of headnote 3(a) is to encourage operators in the Virgin Islands and Guam to do as little as possible in the islands.

The vagueness of headnote 3(a), the lack of definition of the word "manufacture," the lack of printed customs regulations relating to imports from insular possessions, the brevity and vagueness of the Treasury decision interpreting the headnote, have all contributed to the present situation which has resulted in an unfair discrimination against duty-paying importers and has further resulted in a large loss of revenue to the United States without helping materially to develop manufacturing facilities or labor usage in the insular possessions.

There is, of course, no requirement in the law for a minimum contribution to the final product of local labor, local materials, or local investment. The only real standard is the pricing test. Because of the high tariff, this test gives the Virgin Islands operator running room of around $3 or $3.50 per unit. Even if he spends $1 in the islands, profits on these operations may run more than $2 a unit. One domestic manufacturer's subsidiary in the Virgin Islands, shipping approximately 600,000 units annually, probably has a profit on these operations of around a million dollars—which is substantially more than firms in our end of the business have been earning each year on all our operations.

STATEMENT OF MR. ALLEN V. TORNEK,
ALLEN V. TORNEK COMPANY

I am an importer of foreign watches and watch movements which pay full duties to the United States Treasury, equivalent to 100% ad valorem more or less.

I object to the discrimination exercised by United States Customs in permitting largely Japanese watches and watch movements to come into the United States via our insular

possessions, free of duty and free of marking as to origin.

For every watch movement which costs roughly $3.25 in Switzerland, France or Western Germany, the United States' duty is roughly $3.37. Foreign watches coming into the United States mainland from our insular possessions escape this huge duty.

In 1930, the United States Congress legislated Section 301, then known as the insular possessions inducement to manufacture. The purpose was to give benefits to the products of the insular possessions, by way of tariff escapement. The purpose was not to benefit a foreign nation to use the insular possessions as a shield to bring the foreign nation's product into the United States mainland free of duty and free of marking as to origin.

For nineteen years, the old Section 301 lay more or less dormant in usage. Everyone took Congress at its word, and felt that a product of the Virgin Islands meant a product of the Virgin Islands.

On March 15, 1959, Customs issued Treasury Decision 54,821(2), which appeared in Treasury Decisions Vol. 94, April 2, 1959, No. 14, Page 9. This decision, which is apparently the only printed regulation or decision on the subject, permitted watch movements to be brought into the Virgin Islands "not in the entirety" and to be subject to the free tariff and free marking treatment. In other words, this decision, and not Congress, made "sham" manufacture possible. Under this decision a watch movement could be completed in Japan, timed, regulated, and completed, and then remove the barrel assembly, and shipped to the Virgin Islands in two separate shipments, so that same would not arrive in the Virgin Islands in an entirety.

The sole test should be whether the product is a product of the Virgin Islands. Obviously, the Virgin Islands watch is not a product of the Virgin Islands.

a) In 1962, an article in the New York Daily News, General Omar Bradley complained of Russian watch movements coming into the United States mainland from the Virgin Islands free of duty and free of marking.

b) In 1965, Mr. Sinkler, President of Hamilton Watch Company, referred to the Virgin Islands watch, as reported in the magazine "Business Week" as obviously a foreign watch, entering the United States, free of duty, through a tariff loophole. (I contend that it is not a loophole, but Customs has legislated for Congress, by reason of ambiguities in the original Section 301.)

* * *

Senator Russell Long
Committee on Finance
U.S. Senate, Washington, D.C.

Dear Senator:

We, the undersigned are importers of foreign watches, and as such pay full duty to the United States Treasury, equivalent to about 100% ad valorem. We object to insular possession imports of foreign watches.

We object to the discrimination in permitting foreign watches to enter the United States, free of duty, and free of label as to origin.

We object to the test made by Customs that the watches brought into the Virgin Islands "not in the entirety" (Treasury Decision March 18, 1959) constitute a product of the Virgin Islands.

There are little or no skills in the insular possessions, and as a result the alleged production is only limited by the amount of foreign imports available for insular possessions transference of the mainland.

That the insular possession alleged watch production is limited to lever movements, and in this category the total U.S. consumption is about 11,000,000 movements annually. Of this total it is estimated that the insular possessions will export foreign watches to the United States mainland, free of duty and free of origin marking to the extent of about 6,000,000 pieces this year, or roughly six times the domestic production.

We ask that insular possession watch production be restricted, and even more important that all ambiguities as to what constitutes a product of the insular possessions be clarified.

For example, on the definition "not in the entirety," watch movements could be completed in a foreign country, the barrel assembly dismounted, and then shipped to the Virgin Islands or similar insular possessions, in two separate shipments to avoid duty. If there is to be a watch industry in the insular possessions, it should be a "real" industry and not the assembling of components, to simulate a watch industry.

A sham industry to avoid tariff duties should not be condoned by Congress or Treasury.

Most Virgin Islands sales of watch movements are from Virgin Island alleged producers to mainland related companies. This creates distorted values and perpetuates a monopolistic practice. Relief along these lines should also be granted.

Very truly yours,

Taylor Watch Co., Inc.
Continental Fifth Ave., Ltd.
Rodania Watch Co., Inc.
Berman Watch Co., Inc.
S. H. Pomerance Co., Inc.
The Pedre Co., Inc.
Spartan Time Distributors
Mendana Watch Corp.

APPENDIX D

69 F.2d 802

KREUTZ et al. v. DURNING, Collector of Customs, et al.
No. 123.

Circuit Court of Appeals, Second Circuit.
March 12, 1934.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Oscar Kreutz and Margit Kreutz, copartners trading under the firm name of Kreutz & Co., against Harry M. Durning, Collector of Customs at the Port of New York, and Frederick J. H. Kracke, appraiser of merchandise at the Port of New York. From a decree of the District Court for the Southern District of New York dismissing plaintiffs' bill for want of equity (3 F. Supp. 364), plaintiffs appeal.

Affirmed.

William L. Wemple and Arthur Garfield Hays, both of New York City, and Roszel C. Thomsen, of Baltimore, Md., for appellants.

Martin Conboy, U. S. Atty., of New York City (Samuel C. Coleman and Irvin C. Rutter, Asst. U. S. Attys., both of New York City, of counsel), for appellee.

Before L. HAND, SWAN, and CHASE, Circuit Judges.

L. HAND, Circuit Judge.

This is an appeal from a decree dismissing a suit in equity filed by a firm of domestic importers of matches to enjoin the Collector of Customs of the Port of New York from assessing against them customs duties, under the "Anti Dumping Act" (title 2 of the Emergency Tariff Act of 1921 [19 USCA §§ 160–173]). The cause came up upon the pleadings alone, and the judge dismissed the suit because the plaintiffs had an adequate remedy at law. The plaintiffs argued that the act was unconstitutional in that the importer had no adequate way to challenge the action of the Secretary of the Treasury and his subordinates, who assess the duty. Section 201 (a) of the Act (19 USCA § 160 (a) requires the Secretary, in case he concludes after investigation that a local industry may be injured because competing merchandise is likely to be sold in the United States "at less than its fair value," to make a public finding to that effect. Subdivision (b), 19 USCA § 160 (b), directs any appraiser to notify the Secretary if he suspects "that the purchase price" of any imported merchandise "is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the cost of production)." After the Secretary has made such a public finding, section 202 (a), 19 USCA § 161 (a) imposes, in addition to other duties, "a special

dumping duty" equal to the difference between "the purchase price or the exporter's sales price" and "the foreign market value (or, in the absence of such value * * * the cost of production)." Later sections define the four terms used in this equation.

[1] The Secretary, by article 712 of the Customs Regulations of 1923, provided that "merchandise is sold at less than its fair value within the meaning of section 201 (a) of the Act, if the purchase price or exporter's sale price of such merchandise is less than its foreign market value (or cost of production)." The plaintiffs' first complaint is, that this regulation is not in accordance with the statute; that sales in the United States are not necessarily made at less than fair value, because the purchase price, or exporter's sales price, is less than the foreign market price, or cost of production. It may indeed be true that merchandise is "likely to be sold in the United States * * * at less than its fair value," in other cases than those in which the regulation applies. But that is not important, provided that, whenever the regulation does apply the merchandise is "likely to be sold at less * * * than its fair value." The Secretary may not have used all his powers, and may have been at fault for that reason; but the importer cannot complain unless he has exceeded them. He has certainly not exceeded them in so defining his duties, because the very "dumping duty" itself is measured in the terms of the regulation.

[2] The gravamen of the suit lies, however, elsewhere, as we understand it; it is that the finding of the Secretary is made ex parte and yet concludes the importer; further that the duty is imposed by the collector and that from his decision no appeal exists except to the Customs Court and thereafter to the Court of Customs and Patent Appeals, both of which are not "constitutional," but "legislative," courts. As such they afford no sufficient relief; a citizen must be given access somewhere to a true court before his money may be taken. Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285, 76 L. Ed. 598. Moreover, even if this be not true, the importer must pay the duty before he can appeal to the Customs Court from the collector's liquidation (section 1515, title 19, U. S. Code [19 USCA § 1515]). Finally the statute is retroactive and uncertain, for the importer cannot know when he brings in goods whether he will be taxed or by what standard. For all these reasons the act is unconstitutional.

The prescribed procedure is that after the Secretary by his declaration has set the machinery in motion, an appraiser fixes, and reports to the collector, the elements from which the duty is to be computed; the purchase price, the exporter's sale price, the foreign market value, or the cost of production. Section 209 (19 USCA § 168). From these the collector will compute the duty by a simple subtraction of the purchase price or exporter's sales price from the foreign market value or cost of production. That is merely a ministerial duty. The importer then may "appeal to reappraisement" from the appraisal to the Customs Court (section 210 [19 USCA § 168]); his appeal staying liquidation meanwhile (article 737, Regulations of 1923). That appeal is in effect a trial de novo; the importer may appear, cross-examine witnesses, introduce his own evidence, and in general conduct himself as a party in court (section 1501, title 19, U. S. Code [19 USCA § 1501]). At the conclusion he may appeal to a court of three judges of the Customs Court and from that court to the Court of Customs and Patent Appeals (Jud. Code § 198, section 310, title 28, U. S. Code [28 USCA § 310]); and finally in some cases the Supreme Court may issue certiorari, though not on mere questions of value (Jud. Code § 195, section 308, title 28, U. S. Code [28 USCA § 308]). Such is the procedure which is thought to be so inadequate as to make the act unconstitutional.

Beneath all the objections rests the implication that in collecting customs duties the government must accord its citizens a day in court, a judicial tribunal, apparently a "constitutional court," which the Court of Customs and Patent Appeals is not. Ex parte

Bakelite Corporation, 279 U. S. 438, 49 S. Ct. 411, 73 L. Ed. 789. That has certainly not hitherto been the understanding of the Supreme Court. Cary v. Curtis, 3 How. 236, 11 L. Ed. 576; Den ex dem. Murray v. Hoboken Land & Improvement Co., 18 How. 272, 15 L. Ed. 372; Hilton v. Merritt, 110 U. S. 97, 107, 3 S. Ct. 548, 28 L. Ed. 83; Auffmordt v. Hedden, 137 U. S. 310, 321, 329, 11 S. Ct. 103, 34 L. Ed. 674; Ex parte Bakelite Corporation, supra, 279 U. S. 458, 49 S. Ct. 411, 73 L. Ed. 789. The argument is that it is Crowell v. Benson, supra, 285 U. S. 22, 52 S. Ct. 285, 76 L. Ed. 598, which has effected the change; it is Crowell v. Benson which laid it down generally that the findings of an administrative officer could not become the basis for depriving a citizen of his property; the Constitution secured him recourse ab initio to a court, to a "constitutional," not "legislative," court. In fact Crowell v. Benson decided nothing of the sort; its doctrine was expressly confined, first, to underlying, "jurisdictional" facts on which a court's power rests; second, to transactions inter partes; dealings of the government with its citizens were expressly excluded. See note (1933) 46 Harv. L. Rev. 478. Were its scope not so confined, it would have overthrown the accepted procedure of the Interstate Commerce Commission, the Federal Trade Commission, the Shipping Board, the Board of Tax Appeals, and, we should suppose, the assessment of damages in the admiralty by a commissioner. The opinion nowhere intimated that any judicial review was necessary in customs collections. Here indeed we need not go so far; arguendo we could safely assume that somewhere before the importer pays, he must have access to a court, not indeed a "constitutional" court, but a tribunal governed by the procedural rules of a court, with the same incidental powers and staffed by officials, independent of executive control, whose tenure is on good behaviour and whose duties exclude them from other occupation (section 1518, title 19, U. S. Code [19 USCA § 1518]). Such a tribunal is the Customs Court; it offers the same protection against unlawful exactions as a "constitutional" court; its decisions, pro hac vice at least, are due process of law. Even plainer is the status of the Court of Customs and Patent Appeals (sections 301, 301b, title 28, U. S. Code [28 USCA §§ 301, 301b]), to which the dissatisfied importer may appeal. On what theory it can be supposed that these together do not give an adequate remedy, we find it difficult to understand.

Nor is it of moment that the Secretary makes his preliminary finding ex parte and in camera. That is indeed a condition upon the duty, but a condition whose verification becomes inevitable before the importer can be touched. As the Secretary has construed his duties, his finding that *some* duty is due is based upon the same equation that the Customs Court must use to find *what* duty is due. Those elements being the relevant issues in that court, and by it judicially determined, govern the incidence and amount of the duty; if the court finds against the importer, they have incidentally vindicated the Secretary. Moreover, as the appraisement determines everything and can go to completion while the liquidation is suspended, the importer has the substance of his controversy settled without paying a cent; it is only upon appeal by "protest" from the collector's liquidation that the duty must be paid (section 1515, title 19, U. S. Code [19 USCA § 1515]). Before that time arrives all the merits will have been settled.

Finally, we can see no grievance in the supposed retroactive feature of the act. It is quite true that an importer brings goods into the United States at his peril, that it may be found that he has been "dumping"; and that that decision will follow the importation. All decisions in that sense are retroactive; but the constitutive factors on which the duty is reckoned are expressly referred to the time of exportation. That the importer may not know whether the Secretary will discover them, or choose to act upon them is nothing; he obviously takes his chances.

It makes little difference whether with the

judge we say that the importers had an adequate remedy at law and so may not come into equity; or whether we dispose of their claims on the merits, holding that the statute is valid. On the whole, it seems to us best, with a renewed caution against any implication that some judicial review is ever necessary in customs controversies to adopt the second course and to affirm the decree upon the merits.

Decree affirmed.

94 F.2d 85

COTTMAN CO. et al. v. DAILEY, Collector of Customs.

No. 4236.

Circuit Court of Appeals, Fourth Circuit.

Jan. 4, 1938.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; W. Calvin Chesnut, Judge.

Suit by the Cottman Company and another against Gilbert A. Dailey, Collector of Customs at the Port of Baltimore, to enjoin defendant from assessing a special dumping duty on certain phosphate rock. The suit was dismissed for lack of jurisdiction, D.C., 20 F.Supp. 142, and plaintiffs appeal.

Affirmed.

Roszel C. Thomsen and William L. Marbury, Jr., both of Baltimore, Md. (Walter L. Clark, and Marbury, Gosnell & Williams, all of Baltimore, Md., on the brief), for appellants.

C. Ross McKenrick, Asst. U. S. Atty., of Baltimore, Md., and Daniel I. Auster, Sp. Atty., Customs Division, Department of Justice, of New York City (Bernard J. Flynn, U. S. Atty., of Baltimore, Md., and Joseph R. Jackson, Asst. Atty. Gen., on the brief), for appellee.

Before PARKER, NORTHCOTT, and SOPER, Circuit Judges.

PARKER, Circuit Judge.

This is an appeal from an order dismissing for lack of jurisdiction a suit instituted to enjoin the defendant Collector of Customs from liquidating an entry at the port of Baltimore of certain phosphate rock, and assessing thereon a special dumping duty under the Antidumping Act of 1921, 19 U.S.C.A. §§ 160–173, based upon an appraisal which had already been the subject of extended litigation in the United States Customs Court and the United States Court of Customs and Patent Appeals. The opinion of the lower court is reported in D.C., 20 F.Supp. 142.

The phosphate rock with respect to which the dumping duty was assessed was imported from Morocco in four cargoes between August 4, 1927, and February 10, 1928. Under the Tariff Act of 1922 it was free of duty; but, on February 9, 1928, the Secretary of the Treasury made a finding and proclamation with respect thereto as prescribed by the Antidumping Act of 1921. The appraiser at Baltimore thereupon proceeded to conduct an investigation and make an appraisal as provided by the act and found a foreign market value of from $7.52 to $7.58 per ton, and a purchase price of from $4 to $5 per ton. Thereupon, there was appeal to reappraisement by the importer with appeals to the Customs Court and the Court of Customs and Patent Appeals, Cottman & Co. v. United States, 20 C.C.P.A., Customs, 344, with the result that the appeal to reappraisement has been dismissed and the Collector at Baltimore, unless restrained by the courts, will proceed to liquidate the entry by assessing duties in the amount of the difference between the foreign value of the phosphate rock and its purchase price as found by the appraiser.

The plaintiffs make three contentions: (1) That the Antidumping Act is unconstitutional because involving a delegation of legislative power to the executive and as authorizing a finding of dumping without

opportunity for hearing as to goods which had entered the country; (2) that the finding of dumping in this case is invalid because made under a regulation defining a sale at less than foreign market value or cost of production as being a sale at less than fair value within the meaning of the statute; and (3) that the appraisals upon which the antidumping duties will be assessed are invalid, notwithstanding the proceedings had in the Customs Court and the Court of Customs and Patent Appeals, because not based upon foreign market value, and that the Collector is, therefore, without statutory authority to proceed with the assessment of duties and liquidation of the entry. The last is their principal contention. The defendant, in addition to supporting the constitutionality of the statute and the authority of the Secretary to make the finding under the antidumping statute, takes the position that the plaintiffs have an adequate remedy at law for any grievance which they may have, that this remedy has been thoroughly tried and exhausted, and that the judge below was correct in holding that he was without jurisdiction to entertain the suit.

For an understanding of the contentions of the parties with respect to the litigation in the Customs Court and the Court of Customs and Patent Appeals, it is necessary that we briefly review that litigation, which was conducted pursuant to section 210 of the Antidumping Act of 1921, 19 U.S.C.A. § 169, providing the same right of appeal and protest to the Customs Court and the Court of Customs and Patent Appeals as is provided with respect to appeals and protests relating to customs duties under existing law, i. e., under the law as codified in 19 U.S.C.A. §§ 381 (1501), 398 (1514), 399 (1515), Tariff Act 1922, §§ 501, 514, 515, 42 Stat. 966, 969, 970, Tariff Act 1930, §§ 501, 514, 515. From the appraisal made by the appraiser at Baltimore there was an "appeal to reappraisement" to the Customs Court as provided by statute, and the case was heard by a single judge, who found the home market value of the phosphate rock in Morocco not to exceed the purchase price. This was affirmed on appeal to the Third Division of the Customs Court, composed of three judges, but was reversed on appeal to the Court of Customs and Patent Appeals because of its exclusion of certain evidence offered by the government. On the second hearing before the single judge of the Customs Court, there was another finding that the market value of the rock did not exceed the purchase price; but this was reversed on appeal to the Third Division of that court, and a judgment was entered by the Division which was crucial in the further progress of the case, and which disposes of most of the contentions which plaintiffs make before us. The concluding portion of the prevailing opinion, which sums up the decision, is as follows: "Since the evidence introduced in the cases at bar fails to establish the statutory foreign market value of the merchandise, the trial court should have weighed the evidence with a view to finding cost of production. Exhibit No. 5 is an affidavit which purports to show the cost of production of these importations. Upon inspection, we find that this exhibit fails to establish every element of cost of production as defined by section 206, quoted supra. *As there is no other satisfactory evidence of statutory cost of production in the record, the appeals might well have been dismissed by the trial court,* under authority of (citing cases). *Under the principle stated in the cited cases, such dismissal would reinstate the dutiable value returned by the appraiser in each of these cases.* We conclude, as a matter of law, that the decision of the trial court, published in Cottman v. United States, T.D. 44581, is contrary to the weight of the evidence, and is therefore reversed and the cause remanded for further proceedings consistent with our decision herein. Let

judgment be entered accordingly." (Italics ours).

On appeal to the Court of Customs and Patent Appeals, this decision of the Customs Court was affirmed, that court saying: "As a result of these considerations we arrive at the conclusion that the court below did not err in finding that neither foreign-market value nor cost of production is shown by the record, and we agree with the conclusion of Judge Cline that the appeal to reappraisement might well have been dismissed by the trial judge." United States v. Cottman & Co., 23 C.C. P.A., Customs, 378. An application to the Supreme Court for writ of certiorari to review this decision was denied. 289 U.S. 750, 53 S.Ct. 695, 77 L.Ed. 1495.

When the case came on for hearing for the third time before the single judge of the Customs Court, he dismissed the "appeal to reappraisement," in accordance with the direction of the Third Division affirmed by the Court of Customs and Patent Appeals. On further appeal to the Third Division, this decision was reversed on the ground that the single judge should have set aside the appraisement as void and should have dismissed the appeals as from nonexistent appraisements. On appeal to the Court of Customs and Patent Appeals, however, this third decision of the Third Division was reversed and the decision of the single judge affirmed; four of the five judges of the Court of Customs and Patent Appeals joining in the affirmance. Two of these judges in an opinion by Presiding Judge Graham based their decision on the ground that the second decision of the Third Division, affirmed by the Court of Customs and Patent Appeals, had become the law of the case and the action of the single judge was in accordance therewith. Judges Lenroot and Hatfield concurred in the view that the action of the single judge in dismissing the appeal should be affirmed, but based their concurrence on the ground that the dismissal and reinstatement of the valuations of the appraiser was correct as matter of law, without regard to the doctrine of "law of the case," saying: "The burden was upon the importer to establish that there was neither foreign value nor cost of production from which the appraiser could make a valid appraisement. Merely establishing that there was no foreign value was not the measure of the burden upon the importer. If such were the rule, an importer could win his case in any reappraisement proceeding by merely establishing that the particular value, foreign, export, etc., found by the appraiser was improper because the merchandise should have been appraised upon some other value. In the case at bar, when it was determined that there was no foreign value of the merchandise, the burden was still upon the importer to establish either the cost of production or that such cost of production could not have been determined by the appraiser. Upon the record before us, there is merely a deficiency of proof of cost of production; in other words, the appellee failed to sustain the burden upon it as to cost of production, and failed to establish that the appraisements were null and void. Hence the trial judge properly dismissed the appeals to reappraisement, and the appellate division erred in holding the appraisements null and void."

As the second decision of the Third Division held that the "appeal to appraisement" should have been dismissed and that the dismissal would reinstate the appraisals, it is clear that treating that decision as the law of the case amounted to the same thing as affirming the decision of the single judge for the reasons given in Judge Lenroot's opinion, the only difference being with respect to the duty of the single judge to hear further evidence; but as the importer offered no further evidence before the single judge, that difference in the opinions, while important in the law of procedure, was not important with respect to the particular case before the court. The result of the decisions of the Court of

Customs and Patent Appeals, therefore, is that the "appeals to reappraisement" under the statute were dismissed for failure of the importer to carry the burden of proof as to cost of production in a country where there was no free market, and that the appraisals appealed from were thereby reinstated. Application was made to the Supreme Court for certiorari to review this last decision of the Court of Customs and Patent Appeals, but was denied. 299 U.S. 566, 57 S.Ct. 27, 81 L.Ed. 416.

[1] We agree with the learned judge below that the District Court had no jurisdiction of the cause. Congress has provided a complete system of corrective justice with respect to matters arising under the customs laws. If an importer is dissatisfied with an appraisal, he may appeal to the Customs Court; his appeal staying liquidation meanwhile. 19 U.S.C.A. §§ 381 (1501). If dissatisfied with a decision of the Collector, may pay under protest and have a review of the decision with appeal to the Customs Court. 19 U.S.C.A. §§ 398, 399 (1514, 1515); United States v. Sherman & Sons Co., 237 U.S. 146, 152, 35 S.Ct. 520, 59 L.Ed. 883. In either case, review by the Court of Customs and Patent Appeals is provided. 28 U.S.C.A. § 310. "This system of corrective justice being complete in itself, it must be concluded that Congress did not intend to allow any other method to redress supposed wrongs occurring in the operation of the laws in relation to the collection of [customs] revenues." Riccomini v. United States, 9 Cir., 69 F.2d 480, 484; Nicholl v. United States, 7 Wall. 122, 130, 19 L.Ed. 125; Gulbenkian v. United States, 2 Cir., 186 F. 133, 135.

[2,3] We do not mean to say that cases may not arise where a District Court may properly enjoin acts by the Secretary of the Treasury or his assistants, when they are threatening action beyond the scope of their authority which because of extraordinary and exceptional circumstances may result in irreparable injury to a complainant. Cf. Waite v. Macy, 246 U.S. 606, 38 S.Ct. 395, 62 L.Ed. 892; Miller v. Standard Nut Margarine Co., 284 U.S. 498, 52 S.Ct. 260, 76 L.Ed. 422. But the assessment of duties on imports which may be paid under protest and recovered in the manner provided by Congress does not present such a case; for there the remedy provided by Congress is adequate, even though the duties assessed be illegal or unconstitutional. The mere fact that the act of Congress is alleged to be unconstitutional or the imposition of the duty beyond the statutory power of the Secretary of the Treasury or his assistants does not present a case for equitable interference where such legal remedy is provided. See Dodge v. Osborn, 240 U.S. 118, 36 S.Ct. 275, 60 L.Ed. 557; White Packing Co. v. Robertson, 4 Cir., 89 F.2d 775, 777; Id. D.C., 17 F.Supp. 120, and cases there cited. Section 3224 of the Revised Statutes, 26 U.S.C.A. § 1543, forbids the maintenance of any suit for restraining the assessment or collection of any tax "unless, by some extraordinary and entirely exceptional circumstance its provisions are not applicable." Dodge v. Osborn, supra, 240 U.S. 118, 122, 36 S.Ct. 275, 276, 60 L.Ed. 557. In the case at bar there is no allegation of such "extraordinary and entirely exceptional circumstance" as would take the case outside the general rule. On the contrary, it clearly appears that the principal ground of contention, i. e., the effect of a controlled foreign market on the determination of foreign value under the Antidumping Act has already been fully litigated. The case is clearly one for the application of the rule well stated in United States v. Sherman & Sons Co., supra, 237 U.S. 146, at page 152, 35 S.Ct. 520, 522, 59 L.Ed. 883, as follows: "The government will not allow foreign goods to be brought into this country and then litigate with the importer as to the amount of duty. Neither bond, nor security, nor retention of the goods during litigation,

will dispense with the necessity of payment. The duty, as assessed by the collector, must be paid in any event,—not only as a condition of the goods being entered, but also as a condition of the right to file a protest. When that has been done, Congress, in order to prevent injustice, has given the importer, who thus pays and protests, the right to bring the goods into the United States, has granted him the opportunity to review the finding of the collector and has also given him the promise of a refund in case the collector is found to have made an overcharge (36 Stat. at L. 103, chap. 6, § 28, subsec. 23). But this right of review is not an appeal in ordinary course of law and can be exercised only in the statutory method, on statutory conditions before special statutory tribunals of limited jurisdiction."

[4, 5] What we have said as to lack of jurisdiction applies to all of the gounds upon which plaintiffs ask relief; but as to their principal ground, i. e., that they have been denied a proper review of the appraisal upon which the Collector is about to liquidate the entry and assess duties under the Antidumping Act, there is another reason why the court below could not inquire into that matter. It had been adjudicated by a court of competent jurisdiction; and the judgment of that court was not subject to review in the District Court. There can be no question but that the Customs Court had full and complete jurisdiction to pass upon all of the questions raised by the "appeal to reappraisement" of the plaintiffs; and a reading of the various decisions of the Customs Court and the Court of Customs and Patent Appeals will leave no doubt that all of these questions were fully considered from every angle. Under such circumstances to enjoin the Collector from liquidating the entry and assessing the proper duties pursuant to the appraisal would be to reverse the decision of the Court of Customs and Patent Appeals, a thing which the Supreme Court had power to do but refused to do on application for certiorari, but which neither the court below nor this court has any power to do. 28 U.S.C.A. §§ 41 (5), 308. Where a judgment is entered by a court of competent jurisdiction, with respect to a matter in controversy before it, such judgment is binding upon the parties and may not be reviewed by another court of co-ordinate jurisdiction under guise of exercising the injunctive power. See Rithølz v. North Carolina State Board of Examiners, D.C., 18 F.Supp. 409, 413; Baltimore & O. R. Co. v. Board of Public Works, D.C., 17 F.Supp. 170, 176.

For the reasons stated, the decree dismissing the bill for lack of jurisdiction will be affirmed.

Affirmed.

(246 U. S. 606)

WAITE et al. v. MACY et al.

(Argued March 28, 1918. Decided April 22, 1918.)

No. 255.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Bill by George H. Macy, Oliver C. Macy, George S. Clapp, T. Ridgway Macy, and Irving K. Hall, doing business as copartners under the name of Carter, Macy & Co., against Byron S. Waite and others, as general appraisers designated by the Secretary of the Treasury as the Board of Tea Appeals. A decree dismissing the bill (215 Fed. 456) was reversed, with directions, by the Circuit Court of Appeals for the Second Circuit (224 Fed. 339, 140 C. C. A. 45), and defendants appeal. Affirmed.

Mr. Assistant Attorney General Warren, for appellants.

Mr. Joseph H. Choate, Jr., of New York City, for appellees.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill brought by importers of tea to prevent the appellants, a board of general appraisers known as the Tea Board, from applying to tea imported by the plaintiffs tests which, it is alleged, are illegal and if applied will lead to the exclusion of the tea. The bill was dismissed by the District Court,

215 Fed. 436, but the decree was reversed and an injunction ordered by the Circuit Court of Appeals, 224 Fed. 359, 140 C. C. A. 45.

The case is within a narrow compass. The Act of March 2, 1897, c. 358, 29 Stat. 604, amended by the Act of May 16, 1908, c. 170, 35 Stat. 163, provides for the establishment of standards "of purity, quality, and fitness for consumption, of all kinds of teas imported," etc., § 3 (Comp. St. 1916, § 8788), and makes it "unlawful * * * to import any merchandise as tea which is inferior in purity, quality and fitness for consumption to the standards" referred to. Section 1 (section 8786). When the tea is entered at the custom house it is compared with the standards by an examiner and if found equal to them in the above particulars it may be released by the custom house; if found inferior it is to be retained. Section 5 (section 8790). But either side may protest and have the matter referred to a board of three general appraisers such as the appellants are. If upon a final re-examination by the board "the tea shall be found inferior in purity, quality and fitness for consumption to the said standards" the tea must be removed from the country within six months. Section 6 (section 8791). The tea is to be tested in the particulars mentioned "according to the usages and customs of the tea trade; including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis." Section 7 (section 8792). The Secretary of the Treasury is given power to enforce the provisions of the act by appropriate regulations. Section 10 (section 8795). A regulation has adopted a test for the discovery of artificial coloring matter which in brief consists in rubbing tea leaves reduced to dust upon semi-glazed paper with a spatula and examining the smear with a lens. If particles of coloring matter are found a test sheet is submitted to chemical analysis for identification of the coloring matter and as soon as it is identified the tea is to be rejected. It was said below to be undisputed that if the tea in question contains any coloring matter, whether present through design or accident, the appellants pursuing the regulation will keep it out. The standard samples of this tea contain no coloring matter but contain a far greater amount of other foreign substances than does this. This tea is worth nearly four times as much a pound as the standard and the sole cause for rejecting it is the presence of from nine to nineteen parts of Prussian blue in a million of elements otherwise not objected to. It is not contended that the Prussian blue is deleterious. These facts are found by both Courts below. Upon them the plaintiffs (the appellees) say that the Government is attempting to apply criteria not allowed by the law. The Government says that the bill is an attempt to control a board in the performance of its statutory duty and to substitute the judgment of a court for that of the board.

[1, 2] No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption. Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267. United States v. United Verde Copper Co., 196 U. S. 207, 215, 25 Sup. Ct. 222, 49 L. Ed. 449. United States v. George, 228 U. S. 14, 21, 33 Sup. Ct. 412, 57 L. Ed. 712. Again, it is true that Courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. First National Bank of Albuquerque v. Albright, 208 U. S. 548, 28 Sup. Ct. 349, 52 L. Ed. 614. But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make. It is said that the appellants are independent of the Secretary and that it is to be presumed that they will decide according to law, as they say in their answer. But if the avoidance of a direct statement as to their intent did not of itself warrant a presumption that they would obey orders, the admissions of their counsel were enough to make their intent to do so plain.

[3] We are brought then to the merits, and we are of opinion that the rule cannot be sustained, notwithstanding that since a former board refused to follow it as it then stood, there have been added clauses intended to save it as a chemical analysis. The regulation makes the presence of any coloring

matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality and fitness for consumption, words repeated over and over again in the act. It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much. All extraneous substances are impurities, and the presence of any may be detected in any way found efficient. But one such substance cannot be picked out and accorded supremacy in evil by an absolute rule irrespective of any harm that it may do. We go one step further and add that in view of the facts as to the standard and this tea, the presence of the Prussian blue affords no adequate ground for keeping the tea out.

The Secretary and the board must keep within the statute, Merritt v. Welsh, 104 U. S. 694, 26 L. Ed. 896, which goes to their jurisdiction, see Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538, 544, 30 Sup. Ct. 417, 54 L. Ed. 608, and we see no reason why the restrictions should not be enforced by injunction, as it was, for instance, in Bacon v. Rutland R. R. Co., 232 U. S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538. Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 32 Sup. Ct. 340, 56 L. Ed. 570. Santa Fé Pacific R. R. Co. v. Lane, 244 U. S. 492, 37 Sup. Ct. 714, 61 L. Ed. 1275. We are satisfied that no other remedy, if there is any other, will secure the plaintiff's rights.

Decree affirmed.

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327 U.S. 678

BELL et al. v. HOOD et al.

No. 344.

Argued Jan. 29, 1946.

Decided April 1, 1946.

Mr. Chief Justice STONE and Mr. Justice BURTON dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Action by Arthur L. Bell, individually, and as an associate of and division superintendent of Mankind United, a voluntary association, and others, against R. B. Hood and others for damages for alleged illegal arrest, false imprisonment, and illegal searches and seizures of property belonging to plaintiff. A judgment dismissing the complaint for lack of jurisdiction was affirmed by the Circuit Court of Appeals, 150 F.2d 96, and plaintiff brings certiorari.

Reversed.

Messrs. A. L. Wirin and Russell E. Parsons, both of Los Angeles, Cal., for petitioners.

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Mr. Frederick Bernays Wiener, of Providence, R. I., for respondents.

Mr. Justice BLACK delivered the opinion of the Court.

Petitioners brought this suit in a federal district court to recover damages in excess of $3000 from the respondents who are agents of the Federal Bureau of Investigation. The complaint alleges that the Court's jurisdiction is founded upon federal questions arising under the Fourth and Fifth Amendments. It is alleged that the damages were suffered as a result of the defendants imprisoning the petitioners in violation of their Constitutional right to

be free from deprivation of their liberty without due process of law, and subjecting their premises to search and their possessions to seizure, in violation of their Constitutional right to be free from unreasonable searches and seizures.[1]

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Respondents moved to dismiss the complaint for failure to state a cause of action for which relief could be granted and for summary judgment on the grounds that the federal agents acted within the scope of their authority as officers of the United States and that the searches and seizures were incidental to lawful arrests and were therefore valid. Respondents filed affidavits in support of their motions and petitioners filed counter-affidavits. After hearing the motions the district judge did not pass on them but, on his own motion, dismissed the suit for want of federal jurisdiction on the ground that this action was not one that "* * * arises under the Constitution or laws of the United States * * *" as required by 28 U.S. C. § 41(1), 28 U.S.C.A. § 41(1). The Circuit Court of Appeals affirmed on the same ground. 9 Cir., 150 F.2d 96. At the same time it denied a motion made by petitioners asking it to direct the district court to give petitioners leave to amend their complaint in order to make it still more clearly appear that the action was directly grounded on violations of rights alleged to stem from the Fourth and Fifth Amendments. We granted certiorari because of the importance of the jurisdictional issue involved.

Respondents make the following argument in support of the district court's dismissal of the complaint for want of federal jurisdiction. First, they urge that the complaint states a cause of action for the common law tort of trespass made actionable by state law and that it therefore does not raise questions arising "under the Constitution

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or laws of the United States." Second, to support this contention, respondents maintain that petitioners could not recover under the Constitution or laws

[1] The complaint stated in part:

"That on or about the 17th day of December, 1942, defendant R. B. Hood and each of the other defendants, unlawfully conspired with each other to act beyond their authority as said Federal Bureau of Investigation agents and police officers respectively, and agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States to be free from the deprivation of liberty and property without due process of law, and to be free from unreasonable searches and seizures, and agreed unlawfully to simultaneously, in the early morning of December 18th, 1942, search the homes of the individual plaintiffs herein without any warrants of search or seizure, and unlawfully to seize the papers, documents and effects of said plaintiffs and of "Mankind United", and falsely to imprison the individual plaintiffs by unlawfully arresting some of the individual plaintiffs without a warrant of arrest and unreasonably to delay the taking of all the individual plaintiffs before a committing officer, in order to effectuate the unlawful searches and seizures aforesaid.

"That thereafter, and on the 18th day of December, 1942, the defendants and each of them, in order to carry out the terms and conditions of the illegal conspiracy aforesaid, and solely for the purpose of carrying out said terms and conditions, did arrest and imprison the individual plaintiffs herein, and did search the homes of said plaintiffs, and seize and carry away books, papers and effects of said individual plaintiffs and of said 'Mankind United.'"

* * * * * * *

"* * * by reason of the deprivation of * * * [their] * * * Constitutional rights * * * [plaintiffs had] * * * suffered damages."

of the United States, since the Constitution does not expressly provide for recovery in money damages for violations of the Fourth and Fifth Amendments and Congress has not enacted a statute that does so provide. A mere reading of the complaint refutes the first contention and, as will be seen, the second one is not decisive on the question of jurisdiction of the federal court.

[1, 2] Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. It charges that the respondents conspired to do acts prohibited by these amendments and alleges that respondents' conduct pursuant to the conspiracy resulted in damages in excess of $3,000. It cannot be doubted therefore that it was the pleaders' purpose to make violation of these Constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent "the party who brings a suit is master to decide what law he will rely upon, and * * * does determine whether he will bring a 'suit arising under' the * * * [Constitution or laws] of the United States by his declaration or bill." The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716. Though the mere failure to set out the federal or Constitutional claims as specifically as petitioners have done would not always be conclusive against the party bringing the suit, where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must

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entertain the suit. Thus allegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States. Wiley v. Sinkler, 179 U.S. 58, 64, 65, 21 S.Ct. 17, 20, 45 L.Ed. 84; Swafford v. Templeton, 185 U.S. 487, 491, 492, 22 S.Ct. 783, 784, 785, 46 L.Ed. 1005. The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.

[3, 4] Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. Swafford v. Templeton, 185 U.S. 487, 493, 494, 22 S.Ct. 783, 785, 786, 46 L.Ed. 1005; Binderup v. Pathe Exchange, 263 U.S. 291, 305-308, 44 S.Ct. 96, 98-99, 68 L.Ed. 308.[2]

[2] For other cases discussing the distinction between questions going to the merits and those going to the jurisdiction, see the following: Illinois Central Railroad Co. v. Adams, 180 U.S. 28, 21 S. Ct. 251, 45 L.Ed. 410; Geneve Furniture Mfg. Co. v. S. Karpen & Bros., 238 U.S. 254, 35 S.Ct. 788, 59 L.Ed. 1295; and see Nashville & St. Louis Ry. v. Taylor, C.C., 86 F. 168.

The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial

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and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. The Fair v. Kohler Die & Specialty Co., supra, 228 U.S. at page 25, 33 S.Ct. at page 411, 57 L.Ed. 716. But cf. Swafford v. Templeton, supra.

[5] But as we have already pointed out the alleged violations of the Constitution here are not immaterial but form rather the sole basis of the relief sought. Nor can we say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction. The Circuit Court of Appeals correctly stated that "the complaint states strong cases, and if the allegations have any foundation in truth, the plaintiffs' legal rights have been ruthlessly violated." [150 F.2d 98.] Petitioners' complaint asserts that the Fourth and Fifth Amendments guarantee their rights to be free from unauthorized and unjustified imprisonment and from unreasonable searches and seizures. They claim that respondents' invasion of these rights caused the damages for which they seek to recover and point further to 28 U.S.C. § 41(1), 28 U.S.C.A. § 41(1), which authorizes the federal district courts to try "suits of a civil nature" where the matter in controversy "arises under the Constitution or laws of the United States," whether these are suits in "equity" or at "law." Petitioners argue that this statute authorizes the Court to entertain this action at law and to grant recovery for the damages allegedly sustained. Respondents contend that the Constitutional provisions here involved are prohibitions against the federal government as a government and that 28 U.S.C. § 41(1), 28 U.S.C.A. § 41(1), does not authorize recovery in money damages in suits against unauthorized officials who according to respondents are in the same position as individual trespassers.

[6-8] Respondents' contention does not show that petitioners' cause is insubstantial or frivolous, and the complaint does in fact raise serious questions, both of law and fact, which the district court can decide only after it has assumed

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jurisdiction over the controversy. The issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments. That question has never been specifically decided by this Court. That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution.[3] And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[4] and to restrain individual

[3] Wiley v. Sinkler, supra; Swafford v. Templeton, supra. See also Brickerhouse v. Brooks, C.C., 165 F. 534, 543, in which a similar suit was held to be within the jurisdiction of the federal court.

[4] Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570; Hays v. Port of Seattle, 251 U.S. 233, 40 S.Ct. 125, 64 L.Ed. 243; Pennoyer v. McConnaughy, 140 U.S. 1, 11 S.Ct. 699, 35 L.Ed. 363; City Railway Co. v. Citizens' St. Railroad Co., 166 U.S. 557, 17 S.Ct. 653, 41 L.Ed. 1114; City of Mitchell v. Dakota Central Telephone Co., 246 U.S. 396, 407, 38 S.Ct. 362, 365, 62 L.Ed. 793.

state officers from doing what the 14th Amendment forbids the state to do.[5] Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.[6] And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.[7] Whether the petitioners

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are entitled to recover depends upon an interpretation of 28 U.S.C. § 41(1), 28 U.S.C.A. § 41(1), and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction. Gully v. First National Bank, 299 U.S. 109, 112, 113, 57 S.Ct. 96, 97, 81 L.Ed. 70; Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199, 200, 41 S.Ct. 243, 244, 245, 65 L.Ed. 577.

Reversed.

Mr. Justice REED joins in the opinion and the result. He desires to add to the cases cited in note 7, Barron v. Mayor and City Council of City of Baltimore, 7 Pet. 243, 8 L.Ed. 672, and Burdeau v. McDowell, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048, 13 A.L.R. 1159.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Chief Justice STONE and Mr. Justice BURTON dissenting.

The district court is without jurisdiction as a federal court unless the complaint states a cause of action arising under the Constitution or laws of the United States. Whether the complaint states such a cause of action is for the court, not the pleader, to say. When the provision of the Constitution or federal statute affords a remedy which may in some circumstances be availed of by a plaintiff, the fact that his pleading does not bring him within that class as one entitled to the remedy, goes to the sufficiency of the pleading and not to the jurisdiction. The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716; Binderup v. Pathe Exchange, 263 U.S. 291, 306–308, 44 S.Ct. 96, 98, 99, 68 L.Ed. 308, and cases cited. But where as here, neither the constitutional provision nor

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any act of Congress affords a remedy to any person, the mere assertion by a plaintiff that he is entitled to such a remedy cannot be said to satisfy jurisdictional requirements. Hence we think that the courts below rightly decided that the district court was without jurisdiction be-

[5] Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979; see also Ex parte State of Virginia, 100 U.S. 339, 346, 347, 25 L.Ed. 676.

[6] Marbury v. Madison, 1 Cranch. 137, 162, 163, 2 L.Ed. 60; Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548, 569, 570, 50 S.Ct. 427, 433, 74 L.Ed. 1034.

[7] See e. g. Dooley v. United States, 182 U.S. 222, 21 S.Ct. 762, 45 L.Ed. 1074, and cases cited and discussed at pages 228–230, of 182 U.S., at pages 764–765 of 21 S.Ct.; Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 349, 350, 60 S.Ct. 285, 287–288, 84 L.Ed. 313.

cause no cause of action under the Constitution or laws of the United States was stated.

The only effect of holding, as the Court does, that jurisdiction is conferred by the pleader's unfounded assertion that he is one who can have a remedy for damages arising under the Fourth and Fifth Amendments is to transfer to the federal court the trial of the allegations of trespass to person and property, which is a cause of action arising wholly under state law. For even though it be decided that petitioners have no right to damages under the Constitution, the district court will be required to pass upon the question whether the facts stated by petitioners give rise to a cause of action for trespass under state law. See Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1268

WALTER KOCHER, PETITIONER

v.

HENRY FOWLER, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B–2) is not as yet reported. The judgment of the district court dismissing the action (Pet. App. B–1) and the oral opinion of the district court denying the motion for preliminary injunction (Pet. App. C–4) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1967. The petition for a writ of certiorari was filed on March 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

297–858—68

QUESTION PRESENTED

Whether the district court lacked jurisdiction to entertain an action brought by petitioner, an American importer of Swiss watches, seeking to compel the Commissioner of Customs to refrain from according duty-free entry to watch movements imported from the insular possessions of the United States by petitioner's competitors.

STATUTES INVOLVED

The pertinent provisions of 28 U.S.C. 1340 and 1583 and of the Tariff Schedules of the United States (19 U.S.C. 1202), are set forth in the Appendix *infra*, pp. 9–11.

STATEMENT

General Headnote 3(a) of the Tariff Schedules of the United States, 19 U.S.C. 1202 (App. *infra*, p. 10) provides that articles which are the product of a United States insular possession are exempt from the assessment of customs duties if the value of any foreign materials they contain is not more than 50 percent of their total value. This provision, which was originally enacted in 1954, was intended to stimulate the development of light industry in the possessions. S. Rep. No. 1679, 89th Cong., 2d Sess., p. 2.

In March 1959, the Bureau of Customs determined that "[t]he assembly in the Virgin Islands into completed watch movements of various parts imported separately into that possession in circumstances not constituting an entirety results in articles manufactured or produced in that possession * * *." Accordingly, under General Headnote 3(a), the completed

product was held entitled to free entry into the customs territory of the United States subject to satisfaction of the 50 per cent value requirement. Treasury Decision 54821(2), 94 Treas. Dec. 154.

Petitioner Kocher imports watches and watch movements from Switzerland into the United States. Those articles are subject to customs duties under the Tariff Schedules. Asserting jurisdiction under 28 U.S.C. 1340, petitioner commenced this action in the district court against the Secretary of the Treasury and the Commissioner of Customs, seeking to compel them to annul Treasury Decision 54821(2) and asking a declaration of the unconstitutionality of General Headnote 3(a) of the Tariff Schedules. Essentially, petitioner seeks to compel the Customs authorities to levy the same duties on watches and watch movements imported from the Virgin Islands as are assessed on his importations. (Pet. 6–7).

The district court denied petitioner's request for a preliminary mandatory injunction and dismissed the complaint for the reason, among others, that "[t]he mere fact that" petitioner was "being hurt commercially by competition" from duty-exempt watch movements did "not give him standing to seek a declaration of invalidity of a governmental regulation or practice" (Pet. App. B–1, C–4).

The court of appeals held that the district court lacked jurisdiction over the action and accordingly affirmed its judgment. The court below was "clear that appellant must make his plea" in the Customs Court. (Pet. App. B–6).

ARGUMENT

In the district court petitioner asserted two reasons why the exemption from duty of watches and watch movements from the Virgin Islands was improper: *first,* that Treasury Decision 54821(2), which granted the exemption, was not authorized by Headnote 3(a) of the Tariff Schedules; and *second,* if the exemption was authorized by Congress, it was unconstitutional under the equal protection clause. However, as the court below held, the district court lacked jurisdiction to entertain these attacks on the application of the customs laws. Moreover, petitioner's claim that the exemption for Virgin Island watches and watch movements was not authorized by Congress is particularly inappropriate for review here, since in subsequent amendments to the Tariff Schedules Congress has expressly recognized that watches assembled in the Virgin Islands are entitled to the exemption in Headnote 3(a).

1. Congress has given to the Customs Court "*exclusive* jurisdiction to review on protest the decisions of any collector of customs * * * as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury * * *." (Emphasis supplied.) 28 U.S.C. 1583 (App. *infra,* p. 9). That Congress intended that all challenges to assessments of duty on imports would be heard by the Customs Court is also evident from the fact that it expressly excluded from the jurisdiction of the district courts actions arising under any Act of Congress providing for revenue from imports that are "within the juris-

diction of the Customs Court." 28 U.S.C. 1340 (App. *infra*, p. 9).

The fact that the Customs Court has exclusive jurisdiction of questions relating to rates of duty does not deprive petitioner of any relief to which he is entitled. If there is merit to petitioner's claim that the granting of an exemption from duty to Virgin Island watches or watch movements denies him the equal protection of the law, the Customs Court can afford him adequate relief by declaring that he is not obligated to pay duty on his importations.

Petitioner points, however, to the fact that Congress has not provided an importer with the right to obtain review in the Customs Court of the duties assessed upon merchandise imported by persons other than himself. While this is true, it simply reflects the legislative judgment than an importer should be accorded only the right (conferred by Section 514 of the Tariff Act of 1930, 19 U.S.C. 1514) to protest the assessment of duties on his own importations. Indeed, prior to 1922, no individual had the right to obtain review of the assessment of duties on other than his own importations. In that year, as Section 516 of the Tariff Act of 1922, 42 Stat. 970, now 19 U.S.C. 1516(b), Congress gave *American manufacturers, producers, and wholesalers* the right to challenge in the Customs Court "the rate of duty, if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by [them]."[1] Neither in

[1] In such an action, the importer of the merchandise involved has the right to appear and be heard as a party in interest. 19 U.S.C. 1516(c). In this action, blanket injunctive relief which

the 1922 Act nor in subsequent tariff legislation was any provision made for review at the behest of an *importer* of competing merchandise. The inference is thus clear: Congress has not seen fit to permit such review in any court.[2]

2. At all events, petitioner is not prejudiced by the fact that he is not entitled to compel the imposition of duty on watches and movements from the Virgin Islands. As noted above, if his equal protection argument has merit the Customs Court could relieve him of the burden of paying the duty. And Treasury Decision 54821(2) can no longer be attacked as unauthorized by the Tariff Schedules, for Congress in effect has approved that Decision. In 1966, Congress examined closely the questions sought to be raised in this suit, through its conduct of extensive hearings

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would have been effective against all importers of Virgin Islands watch movements was sought in the absence of any similar protection of their interests.

[2] Contrary to petitioner's assertion, the decision below does not conflict with any decision of this Court or any other court. Insofar as we are aware, no court has ever held that a person in petitioner's situation may invoke the jurisdiction of a district court to challenge the customs duty treatment afforded a competitor's importations. It is true that, as petitioner notes (Pet. pp. 7–8), the Second Circuit reached the merits in *Kreutz* v. *Durning*, 69 F. 2d 802, in which several importers sought to enjoin the assessment of duties on their own merchandise. But the court pointed out that it made "little difference whether with the [district court] we say that the importers had an adequate remedy at law and so may not come into equity; or whether we dispose of their claims on the merits, holding that the statute is valid." 69 F. 2d at 804 (Pet. App. D–3—D–4). The adequate remedy at law to which the district court had referred was an action in the Customs Court. 3 F. Supp. 364, 366.

on the "Dutiable Status of Watches Assembled in Insular Possessions of the United States." Hearing Before the Senate Committee on Finance on H.R. 8436, 89th Cong., 2d Sess. Following that complete re-examination of the watch assembly industry in the insular possessions (and subsequent to the dismissal of this suit by the district court), Congress enacted Pub. L. 89–805, 80 Stat. 1521. By that act, Congress permitted the continued duty-free importation from the possessions of watches and watch movements assembled there from foreign components but amended the Tariff Schedules so as to limit the number of such articles which may be imported duty-free from such areas (App., *infra*, p. 11).[3]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1968.

[3] The quota system has the effect of continuing the economic stimulation the watch assembly industry brings to the possessions, but at the same time avoids a substantial adverse effect on United States watch production. S. Rep. No. 1679, *supra*, pp. 6–7.

APPENDIX

1. The revelant jurisdictional statutes provide as follows:

> 28 U.S.C. 1340:
>
> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.
>
> 28 U.S.C. 1583:
>
> The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury * * *.

2. The Tariff Schedules of the United States, 19 U.S.C. (1964 ed., Supp. II) 1202, provide in pertinent part:[4]

> GENERAL HEADNOTES AND RULES OF INTERPRETATION
>
> 1. *Tariff treatment of imported articles.*—
>
> All articles imported into the customs territory of the United States from outside thereof

[4] The exception in General Headnote 3(a) with respect to the provisions of headnote 6 of schedule 7, part 2, subpart E, and those provisions, were added by Pub. L. 89-805, November 10, 1966, 80 Stat. 1521. See text accompanying footnote 3, *supra*.

are subject to duty or exempt therefrom as provided in general headnote 3.

* * * * *

3. *Rates of duty.*—The rates of duty in the "Rate of Duty" columns numbered 1 and 2 of the schedules apply to articles imported into the customs territory of the United States as hereinafter provided in this headnote:

(a) *Products of insular possessions:*

(i) Except as provided in * * * headnote 6 of schedule 7, part 2, subpart E, articles, imported from insular possessions of the United States which are outside the customs territory of the United States are subject to the rates of duty set forth in column numbered 1 of the schedules, except that all such articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession or of the customs territory of the United States, or of both, which do not contain foreign materials to the value of more than 50 percent of their total value, coming to the customs territory of the United States directly from any such possession * * * are exempt from duty.

* * * * *

SCHEDULE 7—SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

* * * * *

PART 2.—OPTICAL GOODS; SCIENTIFIC AND PROFESSIONAL INSTRUMENTS; WATCHES, CLOCKS, AND TIMING DEVICES; PHOTOGRAPHIC GOODS; MOTION PICTURES; RECORDINGS AND RECORDING MEDIA.

* * * * *

Subpart E.—Watches, Clocks, and Timing Apparatus.

* * * * *

Subpart E headnotes:

* * * * *

6. *Products of Insular Possessions.*—(a) Except as provided in paragraph (b) of this headnote, any article provided for in this subpart which is the product of an insular possession of the United States outside the customs territory of the United States and which contains any foreign component shall be subject to duty—

(i) at the rates set forth in column numbered 1, if the countries of origin of more than 50 percent in value of the foreign components are countries to products of which column numbered 1 rates apply, and

(ii) at the rates set forth in column numbered 2, if the countries of origin of 50 percent or more in value of the foreign components are countries to products of which column numbered 2 rates apply.

(b) If the requirements for free entry set forth in general headnote 3(a) are complied with, watches (provided for in item 715.05) and watch movements (provided for in items 716.08 through 719.—) which are the product of the Virgin Islands, Guam, or American Samoa and which contain any foreign component may be admitted free of duty, but the total quantity of such articles entered free of duty during each calendar year shall not exceed a number equal to 1/9 of the apparent United States consumption of watch movements during the preceding calendar year (as determined by the Tariff Commission), of which total quantity—

(i) not to exceed 87.5 percent shall be the product of the Virgin Islands,

(ii) not to exceed 8.33 percent shall be the product of Guam, and

(iii) not to exceed 4.17 percent shall be the product of American Samoa.

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